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# **A TALE OF TWO CLINICS: SIMILARITIES AND DIFFERENCES IN EVIDENCE OF THE “CLINIC EFFECT” ON THE DEVELOPMENT OF LAW STUDENTS’ ETHICAL AND ALTRUISTIC PROFESSIONAL IDENTITIES**

JONEL NEWMAN\* AND DONALD NICOLSON\*

“It has been through discussion of the cases that the ethical issues have been brought to life, and that I have reached a deeper understanding of what some of these in fact are. However, it does take a degree of introspection, and putting yourself in the other’s shoes to try to get to grips with the pressures of conflicting needs and competing values. I think it is only through experience that this level of understanding will develop to the point of being a ‘second-nature’ response to a legal issue that I am working on.”<sup>1</sup>

“The clinic has really taught me a lot about myself and made me think about what it is I want to do with my degree. Representing people who would otherwise not have access to an attorney or ‘the system’ has been eye-opening. I would like to continue to work with poor communities and do whatever I can

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<sup>1</sup> Jill, Strathclyde, Fall 2013, Week 2. Excerpts from the diaries of students from the University of Strathclyde Law Clinic are identified by a pseudonym, Fall or Spring term, and the week.

to remedy some of the inadequacies that currently exist.”<sup>2</sup>

For many law clinicians, the above quotations from two clinic students, reflecting on the value of their clinic experiences in learning about ethics and inspiring an ongoing commitment to enhancing access to justice, represent the holy grail. Based on educational theory,<sup>3</sup> and anecdotal evidence,<sup>4</sup> law clinicians and those interested in the ethical development of law students have long maintained that live-client law clinics are an extremely effective—if not *the* most effective—means of developing (a) an awareness and understanding of and commitment to legal ethics (what can be called an “ethical effect” and/or (b) developing or at least sustaining an altruistic commitment to use their legal skills to serve those most in need of legal services (an “altruism effect”).

Unfortunately, however, the results of the very few empirical studies exploring the effect of clinical involvement on students’ ethics and/or altruism have been mixed. In a study of 120 students in two U.S. law schools, Maresh found that 32 of 46 students who had no intention of engaging in public interest careers changed their mind after law clinic participation.<sup>5</sup> Hartwell found that a clinical

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<sup>2</sup> Maria, Miami, Spring 2014. Excerpts from the self-reflection memoranda of students from the University of Miami Health Rights Clinic are also identified by a pseudonym and by Fall or Spring term.

<sup>3</sup> See *infra* Section I.

<sup>4</sup> See e.g. Quintin Johnstone, *Law School Legal Aid Clinics*, 3 J. LEGAL EDUC. 535, 537 (1950); William M. Rees, *Clinical Legal Education: An Analysis of the University of Kent Model*, 9 LAW TEACH 125, 136 (1975); Martin Guggenheim, *Fee-Generating Clinics: Can We Bear the Costs?* 1 CLINICAL L. REV. 677, 683 (1995); Minna J. Kotkin, *The Law School Clinic: A Training Ground for Public Interest Lawyers* and Sally Maresh, *The Impact of Clinical Legal Education on Decisions of Law Students to Practice Public Interest Law*, in EDUCATING FOR JUSTICE: SOCIAL VALUES AND LEGAL EDUCATION (Jeremy Cooper & Louise G. Trubek eds., 1997); Irene Styles & Archie Zariska, *Law Clinics and the Promotion of Public Interest Lawyering*, 19 LAW IN CONTEXT 65 (2001); Kieran Tranter, *Pro-Bono Ethos: Teaching Legal Ethics*, 29 BRIEF 12, 12-14 (2002).

<sup>5</sup> Maresh, *ibid.*

class improved U.S. law students' moral judgment,<sup>6</sup> but this was through simulated, rather than live-client, experience, and, as we shall see,<sup>7</sup> improved moral judgment does not necessarily translate into improved moral behavior. Palermo and Evans did explore the impact of live clinical experience when combined with ethical teaching on the *professed* values of Australian students as they progressed through law school and entered the legal profession, and found some evidence of a positive relation between clinic experience, on the one hand, and students' ethical reasoning and level of commitment to engaging in pro bono legal representation, on the other.<sup>8</sup> Unfortunately, as they had not evaluated students' attitudes *before* they entered the clinic, it was impossible to determine whether this clinical experience initiated new, rather than merely sustained prior, altruistic commitments and ethical values.

There have been other, far more wide-ranging, studies on the possible impact clinics and wider pro bono programs have on the development of altruism in students. Sandefur and Selbin in an extensive survey study did control for (recalled) attitudes of students upon entering law schools in the U.S., but found that when this was taken into consideration, there was no evidence that clinics generally develop, as opposed to sustain, students' altruism.<sup>9</sup> While such a sustaining effect is valuable in itself, given, as we shall see,<sup>10</sup> the apparently negative impact of U.S. legal education on students' ethical and altruistic values and the challenge to their values they will face once in practice, it is important to note that Sandefur and Selbin failed to control for whether the clinics involved were focused predominantly on serving the community or, as is far more common in the U.S., on teaching students. Nor did they control for

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<sup>6</sup> See Steven Hartwell, *Promoting Moral Development through Experiential Teaching*, 1 CLINICAL L. REV. 505, 536 (1994).

<sup>7</sup> See *infra* note 43.

<sup>8</sup> See Josephine Palermo & Adrian Evans, *Almost There: Empirical Insights into Clinical Method and Ethics Courses in Climbing the Hill Towards Lawyers' Professionalism*, 17 GRIFFITH L. REV. 252 (2008).

<sup>9</sup> See Rebecca Sandefur & Jeffrey Selbin, *The Clinic Effect*, 16 CLINICAL L. REV. 57, 92 (2009).

<sup>10</sup> See *infra* section 1(a)(iii).

whether instruction went beyond teaching law and skills to include reflection on access to justice and the lawyer's ethical responsibilities in this regard. Thus, Nicolson has previously argued that a focus on a student's education and the linking of student involvement to earning academic credit risks undermining the message given to students about the importance of serving the community, and, by contrast, clinics which have a social justice orientation and do not give academic credit for participation may better preserve that message.<sup>11</sup>

Rhode<sup>12</sup> and Granfield<sup>13</sup> also conducted extensive U.S. surveys and found that merely requiring or giving students the opportunity to engage in pro bono services while at law school will not necessarily ensure their willingness to engage in pro bono work after graduation, though the latter did find that 34% of those surveyed were influenced in their choice of career by their pro bono experience and that engaging in pro bono work in law school had at least a marginal impact on their motivation to continue once in practice.<sup>14</sup> Both argued that, in order to maximize the potential for clinical and other pro bono experiences to inculcate a commitment to redress unmet legal need once in practice, law schools need to give pro bono programs a high profile and integrated them into the general curriculum.<sup>15</sup> In support, Schmedemann found a more positive impact on the commitment to engage in pro bono service after graduation in both students who had undertaken clinical classes or engaged in pro bono work on a voluntary basis where there were

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<sup>11</sup> Donald Nicolson, *Legal Education or Community Service? The Extra-Curricular Student Law Clinic*, WEB J. OF CURRENT LEGAL ISSUES (2006), available at <http://webjcli.ncl.ac.uk/2006>.

<sup>12</sup> Deborah L. Rhode, PRO BONO IN PRINCIPLE AND IN PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS ch. 7 (2005).

<sup>13</sup> Robert Granfield, *Institutionalizing Public Service in Law School: Results on the Impact of Mandatory Pro Bono Programs*, 54 BUFF. L. REV. 1355 (2007).

<sup>14</sup> *Id.* at 1379, 1399-41; Rhode, *supra* note 12, at 156 (describing that 22% of students were encouraged by their law school experience to engage in pro bono after graduation, but that 19% were discouraged from doing so).

<sup>15</sup> See Granfield, *supra* note 13, at 1412; Rhode, *supra* note 12, at 159-60 and Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 732-35 (1994).

opportunities for reflection on clinical and pro bono experiences and a discussion of issues of social justice.<sup>16</sup>

Finally, through a detailed qualitative study of the learning diaries of law clinic students at a Scottish university—the University of Strathclyde (henceforth, USLC)—Nicolson explored the impact on both ethics and altruism of combining a course devoted entirely to exploring issues of legal ethics and access to justice with what is otherwise an entirely extra-curricular clinic.<sup>17</sup> Like Schmedemann, he found evidence of a commitment to engage in pro bono work after graduation and, like Granfield, that clinical experience caused some students to change career plans in favor of careers focused more on assisting those most in need (an altruism effect). Moreover, he also found that teaching ethics in the context of past and current clinical experiences created the conditions for encouraging students to see a commitment to legal ethics as an integral part of their professional identity.

The study reported in this article replicates that of Nicolson's in terms of methodology and, to a large extent, its findings. However, the fact that diaries from a new cohort of students at the USLC are analyzed alongside self-evaluation reports of students from the University of Miami Health Rights Clinic (henceforth, MHRC) is significant, not only in that it provides additional evidence for both the "ethics effect" and the "altruism effect," but also because, as we shall see in more detail, the two clinics differ in a number of significant ways. Both clinics prioritize the provision of legal services to those most in need over student education. However at the USLC, academic credit for clinic work is optional, and the exception rather than the norm, and the teaching that does occur is focused far more

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<sup>16</sup> Deborah A. Schmedemann, *Priming for Pro Bono Publico: The Impact of the Law School on Pro Bono Participation in Practice*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION 73 (Robert Granfield & Lynn Mather eds. 2009). See also Cynthia Adcock, *Beyond Externships and Clinics: Integrating Access to Justice Education into the Curriculum*, 62 J. LEGAL EDUC. 566 (2013).

<sup>17</sup> Donald Nicolson, *Learning In Justice: Ethical Education in an Extra-Curricular Law Clinic*, in THE ETHICS PROJECT IN LEGAL EDUCATION 171 (Michael Robertson et al., 2010).

on issues of ethics and access to justice than on skills development and substantive law. By contrast, all MHRC students obtain credit for their clinical involvement, and legal ethics forms only one part of a wide range of topics taught. Moreover, there are also important differences between the two clinics in terms of the form and depth of teaching and student reflection on issues of ethics and access to justice. Consequently, a comparison of the reflective diaries of the USLC students and the self-evaluative reports of the MHRC students allows us to draw inferences on how to maximize the potential for law clinics to engender a commitment to ethical and altruistic service as part of the professional identities of law graduates.

First, however, we will provide an outline of the theoretical claims for the value of ethical and altruistic development through clinical experience. We then explain our particular goals for inculcating ethical professional identity in our students before turning to a description of our two clinics, the self-reflection materials prepared by students in each clinic, and the methodology used to analyze the diaries. This leads to the presentation of evidence from our analysis for the conclusion that our clinics are having an impact on students' attitudes which may well lead to the development of ethical and altruistic professional identity, and finally to our own reflections on the lessons we have learned from comparing the reflections of our students on their clinical experience.

## **I. ETHICS, CLINICS, AND EDUCATIONAL THEORY**

### **A. Aims and Assumptions: Teaching Against Legal Education's Hidden Curriculum**

#### **(i) The Goal: Altru-Ethical Professionalism**

Both authors see clinics as an important means to repay the privileges that students and academic staff alike derive from a university education by serving those most in need of legal services.<sup>18</sup> As

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<sup>18</sup> See e.g. Donald Nicolson, *Calling, Character, and Clinical Legal Education: A Cradle to Grave Approach to Inculcating a Love for Justice*, 16 LEGAL ETHICS 1

important as this goal is, we also view clinics as an important vehicle for developing in students a professional identity that includes a commitment to upholding high ethical standards and a recognition that service to those most in need is a moral obligation which continues after entry into legal practice. Such a notion of professionalism—what Nicolson has dubbed “altru-ethical professionalism”<sup>19</sup>—differs from more traditional notions, in which little more is required of professionals than that they have the necessary skills to provide services to their clients, and that they do so competently, zealously and in accordance with promulgated professional norms. By contrast, along with many others,<sup>20</sup> we regard a lawyer’s personal responsibility to maintain high ethical standards as an integral element of professionalism,<sup>21</sup> and the responsibility to attempt to enhance access to justice as part of these ethical standards.<sup>22</sup>

The reduction of professional ethics to mere adherence to professional norms largely but not entirely<sup>23</sup> found in codes of conduct can be criticized on two counts.<sup>24</sup> One is substantive, namely

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(2013); JoNel Newman & Melissa Swain, *Helping Haiti in the Wake of Disaster: Law Students as First Responders*, 6 INTER. HUM. RIGHTS L. REV. 133 (2011).

<sup>19</sup> Nicolson, *id.*

<sup>20</sup> See, e.g., Deborah L. Rhode, IN THE INTERESTS OF JUSTICE 213 (2000); William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond & Lee S. Shulman, EDUCATING LAWYERS 126-29 (2007); ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 24 (2007).

<sup>21</sup> Hamilton and Monson maintain that most legal scholars recognize that “a lawyer’s moral core is the foundation of professionalism.” Neil Hamilton & Verna Monson, *Legal Education’s Ethical Challenge: Empirical Research on How Most Effectively to Foster Each Student’s Professional Formation (Professionalism)*, 9 ST. THOMAS L.J. 325, 331 (2011).

<sup>22</sup> See Hamilton & Monson, *id.* at 331-32 (discussing the formation of professional identity as “an ongoing self-reflective process involving habits of thinking, feeling, and acting,” and defining as an educational objective “professional formation toward a moral core of service to and responsibility for others”).

<sup>23</sup> See Donald Nicolson, *Making Lawyers Moral: Ethical Codes and Moral Character*, LEGAL STUDIES 601, 603-04 (2005); Richard K. Greenstein, *Against Professionalism*, 22 GEO. J. LEGAL ETHICS 327, 351-63 (2009).

<sup>24</sup> In this article, we use the terms codes and rules interchangeably to refer to the body of law regulating lawyers, and—unless specifically noted—are not referring



that these norms fall short of what many would regard as high ethical standards, and the other is regulatory, namely that formal norms and codes are not the most effective means of ensuring that lawyers do in fact act ethically (whatever the content of such ethics might be).

As regards the substantive criticism, there is well-known and widespread criticism that formal professional norms are premised on a “standard conception” involving the notion that lawyers are entitled, if not obliged, to act as ‘hired guns’ or, less pejoratively, “neutral partisans.”<sup>25</sup> Untroubled by ethical considerations, lawyers are left free to harm the administration of justice and the law itself, as well as to third parties, the general public and even the environment. The cocooning of lawyers from their ethical conscience may, in fact, also harm their clients in that lawyers with anesthetized moral consciences may impose solutions paternalistically on clients who would not have wanted their interest pursued at all costs had they been engaged in a “moral dialogue.”<sup>26</sup> At the very least, the shutting down of a lawyer’s moral faculties is argued to lead to a consequent shutting down of the emotional faculty of empathy, which is regarded as crucial for an effective, respectful and caring service to the client.<sup>27</sup> Yet the codes can also be criticized for paying little or no

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to any particular set of regulations such as the Law Society of Scotland’s Code of Conduct or ABA Model Rules of Professional Conduct.

<sup>25</sup> See Donald Nicolson & Julian Webb, PROFESSIONAL LEGAL ETHICS: CRITICAL INTERROGATIONS ch. 6 (1999); Deborah L. Rhode & David Luban, LEGAL ETHICS 132-33 (1992); David Luban, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, WIS. L. REV. 29 (1978).

<sup>26</sup> See Luban, *ibid.* at 160ff; Nicolson & Webb, *supra* note 25, ch. 8, sec. 2.1; Simon, *id.*, 132ff; Stephen L. Pepper, *The Lawyer’s Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, AM. BAR FOUND. RES. J. 613, 630-32 (1986); Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1600 (1995); Ted Schneyer, *Some Sympathy for the Hired Gun*, 41 J. LEGAL EDUC. 11, 27 (1991).

<sup>27</sup> See, e.g., Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665, 2694-95, 2699-700 (1993); Theresa Glannon, *Lawyers and Caring: Building an Ethic of Care into Professional Responsibility*, 43 HASTINGS L.J. 1175 (1992); Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 MIAMI L. REV. 29, 45 (1987);

attention to the need to respect client autonomy and to provide empathetic, but at the same time effective, legal services. More generally, they are often criticized for merely protecting the profession's own self-interest and providing only just enough protection of clients and the public to fend off outside regulatory control.<sup>28</sup>

Equally important is the fact that most professional codes pay no attention to issues of access to justice. For example, the American Bar Association's Model Rules of Professional Conduct state only that lawyers should "aspire to render at least (50) hours of pro bono public legal services per year."<sup>29</sup> Yet none of the rules or codes promulgated by U.S. jurisdictions require bar members actually to serve a minimum number of hours of pro bono service or otherwise assist those who cannot afford their fees.<sup>30</sup> And, in the U.K., the various professional codes do not even mention an aspirational duty to enhance access to justice.

There are many sources suggestive of a moral duty to redress unmet legal need, but we are most attracted to the idea that this flows from an obligation of reciprocity lawyers owe to society.<sup>31</sup> Through their taxes or their contribution to the profits of other taxpayers, all in society pay for the legal education of many lawyers and the college education of some (especially in Scotland). Such

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Carrie Menkel-Meadow, *Portia in a Different Voice: Reflections on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 57 (1985). See also Bruce J. Winick, *Dealing with Client Denial in the Advance Directive Context: A Challenge for the Therapeutically-Oriented Preventive Lawyer*, 4 PSYCHOL. PUB. POL'Y & L. (1999); Marjorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/client Relationship*, 6 CLINICAL L. REV. 259, 270-71 (1999).

<sup>28</sup> See Luban, *supra* note 25, at 148-74; Rhode, *supra* note 20, at 143-47, 211; Robert Granfield & Thomas Koenig, *It's Hard to Be a Human Being and a Lawyer: Young Attorneys and the Confrontation with Ethical Ambiguity in Legal Practice*, 105 W. VA. L. REV. 495, 501-14 (2003).

<sup>29</sup> ABA Model Rule Prof. Conduct 6.1 (2013).

<sup>30</sup> See Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869, 888 (2009) (New York now requires bar applicants to demonstrate that they have provided 50 hours of pro bono services prior to admission, 22 NYCRR 520.16 (2014), and a similar requirement is under consideration in California).

<sup>31</sup> See Nicolson, *supra* note 18, at 37-39.

direct and indirect investment in law students enables the latter to eventually enjoy substantial financial rewards. However, only those who are fortunate enough to afford lawyers or qualify for legal aid benefit from this investment. Moreover, a major reason why so many people lack access to legal services is because lawyers seek to maximize their financial rewards through charging high fees. Consequently, it can be argued that these lawyers have a moral duty to take some remedial action to repay those who helped put them in their privileged position, but do not benefit from their investment in the education of lawyers. Three arguments further support a moral obligation on lawyers to enhance access to justice. One is that their earnings are partly—albeit decreasingly—protected by state limitations on who can practice law and access legal processes. Secondly, many access to justice problems stem from often unnecessary and difficult-to-understand legal complexities created by lawyers serving their clients (and thereby themselves by making legal assistance more necessary). Finally, the whole apparatus of law and the legal system, by which lawyers make their money, is subsidized by the public.

It therefore seems incumbent on law schools to impress upon students the need both to commit to ethics beyond formal codes and to take some responsibility for problems of access to justice. In fact, the message about altruistic service is arguably even more important than that regarding personal ethical standards (even if one leaves aside the fact that personal ethical standards might turn out not to be so ethical!).<sup>32</sup> If, like Rawls, we think that “[j]ustice is the first virtue of social institutions,”<sup>33</sup> then we should think of access to justice as the first virtue of the ethical lawyer. Put crudely, there seems to be a limited value in producing lawyers who are aware of ethical problems, yet who ultimately serve the more powerful in society—for example, by working for firms where morality is viewed as an unaffordable luxury, and the scope of the lawyer’s practice is highly constrained. This is not to say that lawyers should not be made

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<sup>32</sup> See Donald Nicolson, *Legal Education, Ethics and Access to Justice: Forging Warriors for Justice in a Neo-Liberal World*, 22 INT’L J. LEGAL PROF. 1, 5-6 (2015).

<sup>33</sup> John Rawls, *A THEORY OF JUSTICE* 3 (rev. ed. 1989).

ethically aware. Instead, it is to argue that we do a lot more to serve justice—which is, after all, the legitimating goal of law—if we produce lawyers who are not just ethically aware but who are motivated to assist in some way to ensure that everyone has access to legal services. It seems obvious to us that ethically aware lawyers devoting their careers to serving those most in need or doing pro bono work is an improvement over only providing ethically informed services to those who can afford to pay.<sup>34</sup>

(ii) The Limited Imagination of Formal Ethical Norms

Leaving aside the exact extent of the lawyer's professional responsibility, the current approach to inculcating a sense of moral obligation is grossly deficient from both a philosophical and psychological point of view. Seeing morality in terms of obedience to codes or other formal written rules flows from a philosophical tradition that has dominated ethics since the Enlightenment. It is often called the deontic tradition because it sees morality in terms of duties.<sup>35</sup> Deontic ethics is most obviously associated with deontologists like Kant, but is also found in many religions, as exemplified by the Bible's ten commandments, and even in utilitarianism. The duties may be specific and categorical, such as duties not to lie, break confidences, etc., or general and require tailoring to the particularities of each situation, such as the duty to always do whatever maximizes utility in any given situation. However, whatever the content and form of the duties, moral behavior is treated as primarily an intellectual activity. It is assumed either that our rationality enables us to know what our duties are and what they require, and

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<sup>34</sup> Cf. Rhode, *supra* note 20, at 26 (arguing that legal education should strive to “encourage a sense of professional responsibility for the public interest”); Stuckey, *supra* note 20, at 62 (“All professional values deserve attention by law schools, but teaching students to strive to seek justice may be the most important goal of all”).

<sup>35</sup> Nicholas J. Dent, *THE MORAL PSYCHOLOGY OF THE VIRTUES* 32-33 (1984) (explaining that “*deon*” is the Greek word for duty, and contrasting this tradition with aretaic or virtue ethics (see *infra* section B) and also Michael Slote, *FROM MORALITY TO VIRTUE* (1992); Phillip Montague, *Virtue Ethics: A Qualified Success Story* 29 *AM. PHIL. Q.* 53 (1992)).

that somehow this will motivate obedience or, more commonly, that duties need to be laid down in ethical, legal and religious codes, and reinforced by threats of punishment.<sup>36</sup>

For many, however, reducing ethics to simply obeying duties and codes is an inferior form of morality. For example, following a pure form of Kantianism, the developmental psychologist, Kohlberg regards the highest stage of moral development as one wherein individuals formulate their own moral principles (though he nevertheless believes that these apply universally).<sup>37</sup> More radically, postmodernists like Bauman argue that codes are the antithesis of morality and that morality ends where ethical codes begin.<sup>38</sup> Morality involves recognition of the Other's unspoken and unconditional demand, which, because it is unlimited in scope and ambiguous as to content, cannot be reduced to formula and rules. Indeed, Bauman argues that the "greater the moral responsibility, the dimmer is the hope of its normative regulation."<sup>39</sup> Morality is thus marked by personal choice and anxiety, both of which are extinguished by codes. As Rhode observes, when morality is reduced to codes, "[t]he result is legal ethics without the ethics."<sup>40</sup> While there is much that

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<sup>36</sup> See Zygmunt Bauman, *POSTMODERN ETHICS* (1993), at chapters 1-3; Angus J. Dawson, *Professional Codes of Practice and Ethical Conduct*, 11 J. APPLIED PHIL. 146 (1996).

<sup>37</sup> See e.g., Lawrence Kohlberg, *Moral Stages and Moralization: The Cognitive-Developmental Approach*, in *MORAL DEVELOPMENT AND BEHAVIOUR* (1976); *ESSAYS ON MORAL DEVELOPMENT, VOL 1: THE PHILOSOPHY OF MORAL DEVELOPMENT* (1981); *ESSAYS ON MORAL DEVELOPMENT, VOL 2: THE PSYCHOLOGY OF MORAL DEVELOPMENT* (1984); Lawrence Kohlberg, Charles Levine & Alexandra Hower, *MORAL STAGES: A CURRENT FORMULATION AND A RESPONSE TO CRITICS* (1983).

<sup>38</sup> See Bauman, *supra* note 36; Zygmunt Bauman, *LIFE IN FRAGMENTS: ESSAYS IN POSTMODERN MORALITY* (1995), at ch. 1; Zygmunt Bauman, *What Prospects of Morality in Times of Uncertainty?*, 15 *THEORY CULTURE AND SOCIETY* 11 (1998). See also Dawson, *supra* note 35, at 153; Steven R. Salbu, *Law and Conformity, Ethics and Conflict: The Trouble with Law-Based Conceptions of Ethics*, 68 *INDIANA L.J.* 101 (1992).

<sup>39</sup> See Bauman, *What Prospects of Morality in Times of Uncertainty?*, *id.* at 20 (emphasis removed).

<sup>40</sup> Deborah L. Rhode, *Legal Education: Rethinking the Problem*, 40 *PEPPERDINE L. REV.* 437, 450 (2013). See also, e.g., Granfield & Koenig, *supra* note 28, at

is inspirational in these accounts of ethics, one need not go that far to realize—as some practicing lawyers themselves do<sup>41</sup>—that relying solely on codes and duties to ensure that lawyers act ethically is inadequate.

Instead, one can begin with the psychology of moral behavior. Following Rest, it has come to be accepted that moral behavior (whatever its content) involves at least<sup>42</sup> four components: sensitivity, judgment, motivation and courage.<sup>43</sup> First, moral sensitivity enables individuals to recognize moral problems when they arise. This requires both cognitive and affective psychological capacities, in that awareness that a situation raises moral issues may stem from empathy or guilt, rather than intellectual categorization. Second, moral judgment enables individuals to identify the salient features of issues, and to select and justify appropriate responses. These two psychological components, however, only take individuals so far towards acting morally. Empirical research repeatedly confirms that *knowing* what is morally right is only weakly linked to *doing* what is morally right.<sup>44</sup> Acting morally requires two additional components.

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499-500; William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1143 (1988).

<sup>41</sup> See Granfield & Koenig, *supra* note 28, at 508-12.

<sup>42</sup> See Laura J. Duckett & Muriel B. Ryden, *Education for Ethical Nursing Practice*, in MORAL DEVELOPMENT IN THE PROFESSIONS: PSYCHOLOGY AND APPLIED ETHICS 61 (James Rest & Darcia Narvaez eds., 1994) (arguing that “implementation” involves a fifth, albeit interpersonal rather than purely psychological, component).

<sup>43</sup> See James Rest, *The Major Components of Morality*, in MORALITY, MORAL BEHAVIOUR AND MORAL DEVELOPMENT (W. Kurtines & J. Gewirtz eds., 1984); Darcia Narvaez & James Rest, *The Four Components of Acting Morally*, in MORALITY, MORAL BEHAVIOUR AND MORAL DEVELOPMENT (W. Kurtines & J. Gewirtz eds., 1995), at chapter 1. See also Joel J. Kupperman, *CHARACTER* (1991), at ch. 4. Note that Rest et al. refer to “moral character” instead of moral courage, but we have not followed that convention here, because we will argue that developed moral character involves all four components, and not just moral courage.

<sup>44</sup> See Rest, *id.*, at 21-22; James R. Rest, *Can Ethics Be Taught in Professional Schools? The Psychological Research*, 1 ETHICS EASIER SAID THAN DONE 22 (1988).

Moral motivation ensures that individuals want to put into effect the moral solution selected and elevate it over competing considerations, such as self-interest or organizational and institutional values. Without this component, individuals might *know* what morality requires but not in fact *care*. Here it is moral feelings and character dispositions which are more important than cognition. But even if individuals do care, they must have the moral courage to convert ethical thought and concern into ethical action. Doing so may involve resisting temptations to compromise moral standards. Crucial in this regard are the personal virtues of moral fiber, steadfastness, perseverance, and backbone, or what psychologists call ego-strength.

The psychology of moral behavior reveals a serious problem with relying on codes as the means to lawyer's morality. Thus codes and moral duties are highly unlikely on their own to equip lawyers to identify and resolve all potential ethical problems arising in legal practice.<sup>45</sup> Attempts by codes to deal conclusively with all possible moral problems are likely to be frustrated by the limits of human imagination and the rapidly changing nature of the legal profession and its social context. Moreover, codes often contain conflicting duties,<sup>46</sup> yet no means to resolve those conflicts. In fact, given the inherent ambiguity and vagueness of language, even codes written in the form of specific rules rather than aspirational ideals are open to varying interpretations.<sup>47</sup> This suggests that codes always require

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<sup>45</sup> See e.g., Dawson, *supra* note 36; Heidi L. Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885, 932 (1996); Allan C. Hutchinson, *Legal Ethics for a Fragmented Society: Between Professional and Personal*, 5 INT'L J. LEGAL PROF. 176, 183 (1998).

<sup>46</sup> See e.g., Nicolson & Webb, *supra* note 25, ch. 8 (discussing the conflict between the lawyer's duties to the client and to the court).

<sup>47</sup> This is illustrated by confusion over often-conflicting rules governing the practice of lawyers in multiple U.S. jurisdictions, lack of clarity as to the weight to be accorded the ABA's comments on the Model Rules, and conflict between the standards set forth in the rules and the accepted standard of care in any particular jurisdiction. See, e.g., Jane Y. Kim, *Refusing to Settle: A Look at the Attorney's Ethical Dilemma in Client Settlement Decisions*, 38 WASH. U. J.L. & POL'Y 383, 407-413 (2012); Susan E. Thrower, *Neither Reasonable Nor Remedial: The Hopeless Contradictions of the Legal Ethics Measures to Prevent Perjury*, 58

those who they govern to exercise judgment. For two reasons, teaching codes alone is insufficient to inculcate effective ethical judgment in lawyers.

First, it does little to assist students in developing their own sense of ethical professionalism. Without exposure to the extensive legal ethics literature, they are unlikely to grapple with issues such as the meaning of professionalism, the justification for neutral partisanship, and the limits to lawyer's zeal, confidentiality and paternalism. Without exposure to the ethical theories that underlie and inform professional legal ethics, students lack the intellectual tools to help resolve ethical dilemmas that are not covered by the rules or professional conventions. Secondly, current education does little to engage students' affective capacities. Moral judgment is not confined to rationally working out which duty best fits a moral dilemma and how it should be applied. As feminists, postmodernists and a host of earlier ethical theorists recognize, the response to moral issues might equally be an emotional one.<sup>48</sup> It may involve what the virtue ethicist McDowell calls a "perceptual capacity,"<sup>49</sup> which enables individuals to respond to the unique circumstances of each situation by drawing upon empathy, compassion and imagination, as well as their past experiences and entire world-view.<sup>50</sup> In

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CLEV. ST. L. REV. 781, *passim* (2010); Lucian T. Pera, *Grading ABA Leadership on Legal Ethics Leadership: State Adoption of the Revised ABA Model Rules of Professional Conduct*, 30 OKLA. CITY U. L. REV. 637, 644-46 (2005); American Law Institute, *Excerpts from Special Study Conference of Federal Rules Governing Attorney Conduct*, Daniel R. Coquillette, Rptr., Q247 ALI-ABA 311, 337, 340-44, 347 (1996).

<sup>48</sup> See, e.g., Nicolson & Webb, *supra* note 25, at 34-38, 46-49 (regarding feminism and postmodernism); Joan C. Tronto, *MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE* (1993) (regarding Scottish Enlightenment philosophers). See also Stanley G. Clarke & Evan Simpson, *Introduction: The Primacy of Moral Practice*, in *ANTI-THEORY IN ETHICS AND MORAL CONSERVATISM* (Stanley G. Clarke & Evan Simpson eds. 1989).

<sup>49</sup> John McDowell, *Virtue and Reason*, 62 THE MONIST 331, 333 (1979).

<sup>50</sup> See David Luban & Michael Millemann, *Good Judgment: Teaching Ethics in Dark Times*, 9 GEO. J. LEGAL ETHICS 31 (1995); Mark N. Aaronson, *We Ask You to Consider: Learning about Practical Judgment in Lawyering*, 4 CLINICAL L. REV. 247 (1998).



addition, affective faculties may sensitize lawyers to moral issues, and motivate them to act morally<sup>51</sup> as well as to implement moral decisions with “warmth, empathy, compassion, and connectedness,” rather than in a “cool, distant or autocratic manner.”<sup>52</sup>

The final and most significant problem with codified, duty-based ethics is that, even if lawyers can identify and resolve moral problems, they still need to care about doing the right thing and have the backbone to resist competing pressures. But codes have little to say about moral motivation and courage. Instead, lawyers are assumed to have these faculties, or otherwise it is hoped that the threat of sanctions will ensure that codes are obeyed. The effectiveness of this threat is, however, crucially dependent on the ability to detect wrongdoing, often in situations where lawyer behavior is hidden from view.<sup>53</sup> It is also dependent on professional bodies having the resources and will to pursue and punish wrongdoers, yet the record to date<sup>54</sup> indicates that neither commodity is in great supply. Moreover, empirical research suggests that lawyers who pay attention to ethical rules solely because of fear of punishment are

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<sup>51</sup> Feldman, *supra* note 45, at 904-908.

<sup>52</sup> Duckett & Ryden, *supra* note 42, at 61.

<sup>53</sup> Richard O'Dair, LEGAL ETHICS: TEXT AND MATERIALS 5 (2001). This problem is exacerbated by the likely reluctance of lawyers to risk being ostracized if they report their colleagues. Rhode, *supra* note 12, at 709.

<sup>54</sup> Richard L. Abel, THE LEGAL PROFESSION IN ENGLAND & WALES 134-35, 252-53 (1988); Michael Zander, *Only the Talk Is Tough*, 95 GAZETTE 46, Dec. 2, 1998; *The Times*, May 1998, 9; Michael Burrage, *From a Gentlemen's to a Public Profession: Status and Politics in the History of English Solicitors*, 3 INT'L J. LEGAL PROF. 45, 56-57 (1996), and in relation to the U.S., Judith A. McMorrow, Jackie A. Gardina & Salvatore Ricciardone, *Judicial Attitudes Toward Confronting Attorney Misconduct: A View from the Reported Decisions*, 32 HOFSTRA L. REV. 1425 (2004); Andrew L. Kaufman, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 453-60 (3d ed. 1989) (Judges fail to enforce lawyers' ethical duties; and lawyers fail to enforce the ethical duties of their peers); Eric Schnapper, *The Myth of Legal Ethics*, 64 A.B.A. J. 202, 202-03 (1978). For similar trends in other jurisdictions, see e.g., Harry W. Arthurs, *The Dead Parrot: Ethics for Postmodern Professionals*, 6 WESTMINSTER AFFAIRS 3 (1993); Julian Disney, Paul Redmond, John Basten & Stan Ross, *LAWYERS* 83 (2nd ed. 1986).

less likely to be committed to the mandated ethical behavior.<sup>55</sup> This is particularly problematic in the context of the legal profession, given that the competent lawyer's skills include the ability to find ways around inconvenient rules. Consequently, some lawyers might not regard code rules as greatly limiting their freedom to act unethically.

### (iii) Ethics Teaching and the Hidden Curriculum

Duty-based codes of ethics thus fail to address much of what is psychologically required for moral behavior. Matters are even further exacerbated by the current state of legal education, both generally and in relation to legal ethics. As regards the latter, U.S. and U.K. law schools largely confine ethical education to teaching the codes. While this occurs in compulsory stand-alone ethics classes in the US,<sup>56</sup> such classes “are not highly regarded and are seldom inspiring—as the focus tends to be on learning a code of professionalism, rather than engaging in reflective thinking.”<sup>57</sup> Moreover, in U.S. law schools ethics courses are often taught by “a reluctant cadre of junior faculty and outside lecturers” and come to be seen as the “dog of the law—hard to teach, disappointing to take, and often presented to vacant seats or vacant minds.”<sup>58</sup> In the U.K., notwithstanding sporadic calls for professional ethics to be taught at the academic stage of legal education,<sup>59</sup> only roughly a quarter of

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<sup>55</sup> Margaret M. Coady, *The Moral Domain of Professionals*, in CODES OF ETHICS AND THE PROFESSIONS 28 (Margaret M. Coady & Sidney Block eds., 1996), at 49.

<sup>56</sup> See Andrew M. Perlman et al., *A Survey of Professional Responsibility Courses at American Law Schools in 2009* (2009), available at <http://www.legalethicsforum.com/files/pr-survey-resultsfinal.pdf>.

<sup>57</sup> Muriel J. Bebeau, *The Defining Issues Test and the Four Component Model: Contributions to Professional Education*, 31 J. MORAL EDUC. 271, 274 (2002).

<sup>58</sup> See Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 STAN. L. REV. 1547, 1561 (1993) (quoting Dale C. Moss, *Out of Balance: Why Can't Law Schools Teach Ethics?*, STUDENT LAW., Oct. 1991, at 19).

<sup>59</sup> See e.g. Julian Webb, Jane Ching, Paul Maharg & Avrom Sherr, *Setting Standards: The Future of Legal Services Education and Training Regulation in*

law schools do so on a compulsory basis.<sup>60</sup> Instead, the teaching of legal ethics is usually left to the “vocational stage,” where it is almost invariably confined to teaching professional rules. Admittedly, legal ethics teaching in the U.K. has not received the sort of criticisms it has in the U.S. However, even if it were inspiring and went beyond the teaching of the codes, a single class in ethics is likely to be too limited and come too late to reverse what is regarded by many as the implicit message of most legal teaching.

While most students are not explicitly taught ethics (as opposed to the norms of professional responsibility contained in the codes), it is argued that they all learn about ethics, legal practice and professional roles from what has been called the hidden curriculum.<sup>61</sup> These unarticulated value assumptions, which supplement and may be as powerful as those contained in formal curriculum, are communicated to students by example, teaching methods, curriculum choices as to what courses are or are not taught, at what level they are taught and for what number of credits, and whether they are compulsory, and by student culture and contacts with the legal profession.<sup>62</sup>

Thus, notwithstanding the shrinking dominance of black-letter scholarship and the growth of “law and...” courses, it is probably true to say that legal education remains primarily focused on

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*England and Wales* (London, Legal Education and Training Review 2013), available at <http://letr.org.uk/the-report/index.htm>.

<sup>60</sup> Phil Harris & Sarah Beinart, *A Survey of Law Schools in the United Kingdom*, 2004, 39 L. TCHR. 299 (2005).

<sup>61</sup> See Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247 (1978); AALS Curriculum Study Project Committee, *Training for the Public Professions of the Law: 1971*, reprinted in Herbert L. Packer & Thomas Ehrlich, *NEW DIRECTIONS IN LEGAL EDUCATION* 93, 129 (1972) (This concept has also been varyingly referred to as law school’s latent, implicit or informal curriculum); See, e.g., Ronald M. Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox*, 1979 AM. BAR FOUND. RES. J. 247 (1979); Howard Lesnick, *The Integration of Responsibility and Values: Legal Education in an Alternative Consciousness of Lawyering and Law*, 10 NOVA L.J. 633, 634 (1986); Kim Economides, *Legal Ethics—Three Challenges for the Next Millennium*, in *ETHICAL CHALLENGES TO LEGAL EDUCATION AND CONDUCT* (Economides ed. 1998).

<sup>62</sup> See Sullivan et al., *supra* note 20, at 140-42.

teaching “the law” and “how to think like a lawyer.” Yet, whether consciously or not, academics constantly convey messages about justice and ethics.<sup>63</sup> Unfortunately, the lesson tends to be that such issues are unimportant and should yield to more “lawyerly” questions, thus undercutting students’ understanding that the role of a lawyer includes acting as a normative agent.<sup>64</sup> The low visibility of moral values and justice in the formal curriculum is especially apparent whenever questions about lawyers’ ethics, justice and the impact of law on people’s lives cry out for discussion, but are ignored, or when students are told not to confuse their emotional or moral responses to law with the central question of what it is. This combination of the separation of law and justice, and the relegation of the latter to “soft,” and often optional, subjects like jurisprudence is likely to lead to an uncritical, formalistic acceptance of law’s underlying values as neutral and objective, and acceptance of the idea that law *is* justice, and moral behavior merely that which is legal. As an alternative to this legalistic morality, an educational focus on developing technical and argumentative skills in relation to malleable law and facts might lead students to abandon ideas of right and wrong in favor of an instrumental morality, in which their only goal is success and the only constraints pragmatic. Either way, there is little to challenge the standard conception of lawyers whose function is confined to manipulating law and facts in the interests of paying clients,<sup>65</sup> particularly if these concepts remain unexamined

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<sup>63</sup> See e.g., Carrie J. Menkel-Meadow, *Can a Law Teacher Avoid Teaching Legal Ethics?*, 41 J. LEGAL EDUC. 3 (1991); Jane H. Aiken, *Striving To Teach “Justice, Fairness, and Morality,”* 4 CLINICAL L. REV. 1, 3 (1997); Susan P. Koniak and Geoffrey C. Hazard, *Paying Attention to the Signs*, 58 L. & CONTEMP. PROBLEMS 117, 118-19 (1997); Allan C. Hutchinson, *Beyond Black-Letterism: Ethics in Law and Legal Education*, 33 L. TCHR. 302, 309 (1999).

<sup>64</sup> Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 537-38 (1985).

<sup>65</sup> See e.g., Nicolson & Webb, *supra* note 25, ch. 6; See generally Donald Nicolson & Julian Webb, *Lawyers’ Duties, Adversarialism and Partisanship in UK Legal Ethics*, 7 LEGAL ETHICS (SPECIAL ISSUE) 133 (2004); Robert Granfield,

throughout the course of a legal education. Equally, the concentration on legal reasoning as an exercise in dispassionate and abstract logic distracts attention away from law's human and emotional side, while the emphasis on case law portrays law as primarily a means of dispute resolution through adversarial combat<sup>66</sup> and prioritizes the authority of existing values over critical evaluation.

Inculcating in students a sense of altruism is hampered by the increasingly competitive nature of legal education in terms of admissions, results and obtaining employment, and the fact that the increasing expense of a university education encourages students to see it as a short-term investment for long-term financial gain. The channeling of students into lucrative law careers, rather than those devoted to helping the vulnerable, is reinforced by the preponderance of law subjects involving the interests of the rich and powerful, large law firms' dominance of the recruitment process, and by informal messages about legal careers provided by staff and fellow students. However, while many academics may portray a career in large law firms, or in the U.K. at the Bar, as the height of ambition, others may engender student cynicism by openly disparaging lawyers as mindless form-fillers and grubby money-seekers. This leaves little space for the conception of lawyers as heroes, bent on seeking justice and helping those in need.<sup>67</sup> Even more unfortunately, because most law schools fail to engage students in any searching scrutiny of what they want to do in the world, "[i]ndividuals who enter talking about justice often leave talking about jobs."<sup>68</sup>

Given this hidden curriculum, it is hardly surprising that numerous studies show that U.S. legal education tends to undermine

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MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND 55-61 (1992).

<sup>66</sup> Acknowledging that litigation is only a last resort, to be used where other forms of dispute resolution fail, is unlikely to make much difference absent a substantial focus on such other means in teaching law.

<sup>67</sup> Cf. Andrew Goldsmith, *Heroes or Technicians? The Moral Capacities of Tomorrow's Lawyers*, 14 J. PROF. LEGAL EDUC. 1 (1996); Avrom Sherr & Julian Webb, *Of Super Heroes and Slaves: Images and Work of the Legal Profession*, 48 CURRENT LEGAL PROBS. 327 (1989); Burke Marshall, *A Triumph of Law*, 86 YALE L.J. 356 (1976) (reviewing Richard Kluger, *SIMPLE JUSTICE* (1976)).

<sup>68</sup> Rhode, *supra* note 20, at 206.

student idealism about using law to promote justice, and to engender moral and political cynicism, and a propensity towards ethically dubious behavior.<sup>69</sup> For example, in their in-depth study of the

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<sup>69</sup> Usefully summarized in June Chapman, *Why Teach Legal Ethics to Undergraduates?* 5 LEGAL ETHICS 68, 73-79 (2002); Robert Granfield & Phillip Veliz, *Good Lawyering and Lawyering for the Good: Lawyers' Reflections on Mandatory Pro Bono in Law School*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION 53, 53-72 (Robert Granfield & Lynn Mather eds. 2009). See Richard L. Abel, *Choosing, Nurturing, Training, and Placing Public Interest Law Students*, 70 FORDHAM L. REV. 1563 (2002); Ronit Dinovitzer et al., *After the JD: First Results of a National Study of Legal Careers*, American Bar Foundation and NALP, Chicago (2004); Robert Granfield, MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND (1992); Robert Granfield, *The Pedagogy of Public Service: Assessing the Impact of Mandatory Law School Pro Bono on Young Lawyers*, report prepared for the Law School Admission Council, Newton, P.A. (2006); Robert Granfield, *The Meaning of Pro Bono: Institutional Variations in Professional Obligations Among Lawyers*, 41 LAW & SOC'Y REV. 113 (2007); Robert Granfield, *Institutionalizing Public Service in Law School: Results on the Impact of Mandatory Pro Bono*, 54 BUFF. L. REV. 1355 (2007); John P. Heinz et al., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR (2005); Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Toward an Understanding of the Commitment of Social Justice Lawyers*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (Austin Sarat & Stuart Scheingold eds., 1998); Deborah L. Rhode, ACCESS TO JUSTICE (2004); Deborah L. Rhode, PRO BONO IN PRINCIPLE AND IN PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS (2005); Debra Schleeef, *Empty Ethics and Reasonable Responsibility: Vocabularies of Motive among Law and Business Students*, 22 LAW & SOC. INQUIRY 619 (1997); Debra J. Schleeef, MANAGING ELITES: PROFESSIONAL SOCIALIZATION IN LAW AND BUSINESS SCHOOLS (2006); Robert Stover, *Making It and Breaking It: The Fate of Public Interest Commitment During Law School* (1989); David B. Wilkins, *Doing Well by Doing Good? The Role of Public Service in the Careers of Black Corporate Lawyers*, 41 HOUS. L. REV. 1 (2004); Thomas E. Willging & Thomas G. Dunn, *The Moral Development of the Law Student: Theory and Data on Legal Education*, 31 J. LEGAL EDUC. 306, 320, 339 (1982); Gregory J. Rathjen, *The Impact of Legal Education on the Beliefs Attitudes and Values of Law Students*, 44 TENN. L. REV. 85, 87-88, 91-96 (1976); Robert V. Stover, *Making It and Breaking It: The Fate of Public Interest Commitment During Law School* (1989), reviewed by David W. Raack, *Law School and the Erosion of Student Idealism*, 41 J. LEGAL EDUC. 121 (1991). For a contrary view, see E. Gordon Gee & Donald W. Jackson, *Current Studies of Legal Education: Findings and Recommendations*, 32 J. LEGAL EDUC. 471 (1982).

informal Harvard Law curriculum, Granfield and Koenig found that even among students entering law school with a desire to pursue a career in public interest law and/or a resistance to pursuing a career in large urban prestigious firms, their assimilation of the values implicitly conveyed during their law school career “makes it extremely likely that they will serve the interests of the corporate elite, rather than other individuals and groups in need of talented lawyers.”<sup>70</sup> Similarly, in a study of law students at two different public law schools conducted a decade later, Sheldon and Kreiger found “students declined in their endorsement of intrinsic values over the first year, specifically moving away from community service values and moving towards appearance and image values.”<sup>71</sup>

Absent similar empirical research, it is difficult to gauge whether U.K. legal education has the same effect. In the only relevant studies, Sherr and Webb<sup>72</sup> found that Warwick Law School left untouched the overwhelmingly conservative political orientation of incoming law students, but, by contrast, Nicolson and Zoumidou<sup>73</sup> failed to detect any obvious negative effect of legal education on attitudes after three terms of study at the University of Strathclyde, whereas similar finding emerged from a recent study of four U.K. teaching institutions.<sup>74</sup> However, even if legal education does not have a negative impact on ethical values in the U.K. similar to that in the US, studies of students’ motivations for studying law<sup>75</sup> reveal that law schools have much work to do if they want to persuade students that practicing law should involve a calling to promote

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<sup>70</sup> Robert Granfield & Thomas Koenig, *Learning Collective Eminence: Harvard Law School and the Social Production of Elite Lawyers*, 33 SOC. Q. 503, 516 (1992).

<sup>71</sup> Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 BEHAV. SCI. L. 261, 281 (2004). The authors posit that “law school may bring about some negative changes in student motivations and values.” *Id.*

<sup>72</sup> Avrom Sherr & Julian Webb, *Law Students, the Market and Socialisation: Do We Make Them Turn to the City?*, 16 J. L. & SOC’Y 225 (1989).

<sup>73</sup> Reported in Nicolson, *supra* note 18, at 41-44.

<sup>74</sup> Richard Moorhead, Catrina Denvir, Rachel Cahill-O’Callaghan, Marva Kouchaki & Stephen Galoob, *The Ethical Identity of Law Students*, 23(3) I.J.L.P. 235-75 (2016).

<sup>75</sup> See *id.*; Sherr & Webb, *supra* note 72.

justice and serve those most in need of legal services, rather than just a means to status, material reward, and an interesting and challenging occupation.

We are not aware that the ethical (as opposed to altruistic and political) predispositions of incoming law students have ever been investigated. But even those with an inclination to do the right thing in general life will not have given much thought to what doing the right thing might mean in the very specific context of legal practice. Here, the *prima facie* justifications for the hired gun or neutral partisan role are likely to be persuasive, particularly if they are not subjected to careful scrutiny during law school. And then, once in practice those committed to high personal ethical standards will come under pressure from various aspects of professional life.<sup>76</sup> For instance, the increasing commercialization of practice places a premium on prioritizing financial over moral considerations, competition for promotion and organizational hierarchies make it difficult to challenge the moral judgment of superiors, while the increasing specialization and bureaucratization of law firms encourage lawyers to see moral responsibility as that of everyone but themselves. These problems may be exacerbated by the deference that legal neophytes are likely to show towards experienced colleagues, especially those with authority over them, and by intense socialization processes that encourage lawyers to regularly flout the rules.<sup>77</sup> Even those who go

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<sup>76</sup> See e.g., in relation to the U.K., Nicolson, *supra* note 18, at 60-61; Andrew M. Francis, *Legal Ethics, the Marketplace and the Fragmentation of Legal Professionalism*, 12 INT'L J. LEGAL PROF. 173 (2005); and in relation to the U.S., Granfield & Koenig, *supra* note 28, at 512-19; Bruce A. Green, *Professional Challenges in Large Firm Practices*, 33 FORDHAM URB. L.J. 7, 23-24, 40 (2005); Nancy B. Rapoport, *Enron, Titanic and the Perfect Storm*, 71 FORDHAM L. REV. 1373, 1384-91 (2003); Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 911-20 (1999); Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 S. CAL. L. REV. 507, 511, 526, 544-45 (1994).

<sup>77</sup> For evidence of unethical behavior in the U.K., see John Baldwin & Mike McConville, *NEGOTIATED JUSTICE: PRESSURES TO PLEAD GUILTY* (1977); Gwynn Davis, *PARTISANS AND MEDIATORS* (1994); Gwynn Davis, *PARTISANS AND MEDIATORS: THE RESOLUTION OF DIVORCE DISPUTES* (1988); Mike McConville, Jacqueline Hodgson, Lee Bridges & Anita Pavlovic, *STANDING ACCUSED: THE*



into practice with the intention to engage in pro bono work are likely to face obstacles in the form of long work hours, family responsibilities and an unsupportive—if not hostile—work culture.<sup>78</sup> Moreover, those who seek careers which serve the underprivileged are, especially in the U.S., likely to be put off by the practical need to pay off student loans.<sup>79</sup>

#### (iv) Ethics Education: The Ideal

If law schools wish to inculcate in their students a sense of professional identity that includes maintaining high ethical standards and altruistic service to those most in need of legal assistance, they clearly have a mountain to climb. Based on the preceding discussion, it would seem that to make the ascent, ethical education

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ORGANISATION AND PRACTICES OF CRIMINAL DEFENCE LAWYERS IN BRITAIN (1994); Andy Boon, *Ethics and Strategy in Personal Injury Litigation*, 22 J.L. AND SOC'Y 353 (1995); Hazel Genn, *HARD BARGAINING: OUT OF COURT SETTLEMENT IN PERSONAL INJURY ACTIONS* (Oxford, Clarendon Press 1987); Bren Neale & Carol Smart, "Good" and "Bad" Lawyers? *Struggling in the Shadow of the New Law*, 19 J. SOC. WELFARE & FAM. L. 377 (1997); Mike McConville, *Plea Bargaining: Ethics and Politics*, 25 J. L. & SOC. 562 (1998); Janine Griffiths-Baker, *SERVING TWO MASTERS: CONFLICTS OF INTEREST IN THE MODERN LAW FIRM* (2002); for the U.S., see Schlitz, *id.*, and, *inter alia*, Catherine Gage O'Grady, *Wrongful Obedience and the Professional Practice of Law*, 19 J. L. BUS. & ETH. 9, 10-12 (2013); Harry T. Edwards, *Renewing Our Commitment to the Highest Ideals of the Legal Profession*, 84 N.C. L. REV. 1421, 1427-28 (2006); Susan P. Koniak, *Testimony, Where Were the Lawyers? Behind the Curtain Wearing Their Magic Caps*, in *Accountability Issues: Lessons Learned from Enron's Fall—Senate Judiciary Committee Hearing* (Feb. 6, 2002); Lisa G. Lerman, *Scenes from a Law Firm*, 50 RUTGERS L. REV. 2153, 2175-83 (1998); Margaret Kline Kirkpatrick, *Partners Dumping Partners: Business Before Ethics in Bohatch v. Butler & Binion*, 83 MINN. L. REV. 1767, 1784-86 (1999); William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243 (1998).

<sup>78</sup> See Green, *supra* note 75, at 9, 33-36; O'Grady, *supra* note 76, at 23-26.

<sup>79</sup> See Rhode, *supra* note 12, at 6; Cynthia Fuchs Epstein, *Stricture and Structure: The Social and Cultural Context of Pro Bono Work in Wall Street Firms*, 70 FORDHAM L. REV. 1689 (2002); David B. Wilkins, *Doing Well by Doing Good? The Role of Public Service in the Careers of Black Corporate Lawyers*, Address at the Eighth Annual Frankel Lecture, in 41 HOUS. L. REV. 1, 73-80 (2005).

will need to pursue four goals. First, given the implicit message that ethics are not important, or, at best, merely require keeping one's nose clean, law schools need to *inspire* in students a conception of ethics as going beyond mere adherence to codes. Second, given that the current rules can never resolve all possible ethical dilemmas that might arise in practice, and given that these rules and overarching professional roles are highly contested, ethical education needs to *illuminate* the tools which ethical theory and applied ethical discourse provide for the resolution of ethical dilemmas, as well as the realities of legal practice which affect such resolution in real-life. Third, given that these tools and ethical codes themselves always require the exercise of choice and judgment, ethical education needs to *illustrate* the ethical dimensions of legal practice by giving students practice in resolving dilemmas. Finally, because recognizing ethical dilemmas and working out how to resolve them is insufficient by itself to ensure moral behavior, ethical education needs to begin to *inculcate* in students the habit of identifying, evaluating and caring about ethical issues so that this becomes a more or less spontaneous response once they are in practice, especially when faced with the many countervailing pressures to compromise ethical values.

If these goals are achieved, legal education will have succeeded in making legal ethics part of a student's professional moral identity, or, in the language of moral psychology, their professional moral character. Moral character involves relatively stable character traits, dispositions, habits of perception, feelings, and behavior relevant to issues of morality. If properly developed, moral character can be said to equip individuals not just with moral sensitivity and judgment, but also with moral motivation and courage.<sup>80</sup> Thus, moral "saints," such as Mahatma Gandhi, Nelson Mandela and Oskar Schindler, seem to act out of deep-seated and spontaneous feelings of compassion, empathy, etc.—by "habits of the heart"—rather than conscious deliberation. This is confirmed by

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<sup>80</sup> See generally CHARACTER PSYCHOLOGY AND CHARACTER EDUCATION (Daniel K. Lapsley & F. Clark Power eds., 2005).

studies of moral exemplars who acted more or less automatically.<sup>81</sup> And, on the basis of the insight that “what we *see* depends on who we *are*,”<sup>82</sup> and on empirical studies, it is argued that moral behavior is more likely for those for whom moral considerations are central to their personal identity and sense of self.<sup>83</sup> Indeed, following Aristotle, Blasi argues that where moral motivations are central to the individual’s self-identity, “moral action flows from a kind of spontaneous necessity” without the need for willpower or moral courage to overcome temptations or pressures to act unethically.<sup>84</sup>

Admittedly, law students are likely to begin their studies with their moral character already relatively fixed. At the same time, recent psychological research suggests that early adulthood is a particularly key time for moral and self-identity development.<sup>85</sup> Moreover, while students might have relatively well-developed *personal* moral character traits in relation to issues of morality which arise in the family, friendships, school, sports, etc., without exposure to the realities of legal practice, the type of ethical issues it raises, and the moral considerations relevant to resolution of those ethical issues, students will not have begun to develop a *professional* moral character. And, as law teachers generally are the first to introduce students to the legal world, they have a unique opportunity

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<sup>81</sup> See Samuel P. Oliner & Pearl M. Oliner, *THE ALTRUISTIC PERSONALITY: RESCUERS OF JEWS IN NAZI EUROPE* (1988); Anne Colby & William Damon, *SOME DO CARE: CONTEMPORARY LIVES OF MORAL COMMITMENT* (1992).

<sup>82</sup> See Daniel K. Lapsley & Darcia Narvaez, *Moral Psychology at the Crossroads*, in Lapsley & Power, *supra* note 79, at 61 (citing Gilbert Meilaender, *THE THEORY AND PRACTICE OF VIRTUE* (1984)).

<sup>83</sup> See Lapsley & Power, *supra* note 79, chs. 1, 2-4, 9, and 13; F. Clark Power, *Understanding the Character in Character Education*, presented to the American Educational Research Association, Chicago, March, 1997, available at <http://tigger.uic.edu/~Inucci/MoralEd/articles/powerunder.html>.

<sup>84</sup> Augusto Blasi, *Moral Character: A Psychological Approach*, in Lapsley & Power, *supra* note 79, at 84-85.

<sup>85</sup> Daniel K. Lapsley & Gustavo Carlo, *Moral Development at the Crossroads: New Trends and Possible Futures*, 50 *DEVELOPMENTAL PSYCHOL.* 1, 1-7 (2014); Anne Colby & William Damon, *SOME DO CARE: CONTEMPORARY LIVES OF MORAL COMMITMENT* (1992).

to influence this process.<sup>86</sup> As the Carnegie report on legal education observed, powerfully engaging law school experiences can potentially “influence the place of moral values such as integrity and social contribution in students’ sense of self.”<sup>87</sup>

Nevertheless, while the positive impact reported by law clinicians and partly reflected in the research described above suggests that law clinics may have an impact, such impact is limited by the fact that many incoming students will have moral characters which predispose them towards a formalistic or instrumentalist approach to professional norms and/or a lack of concern about those who cannot access legal services. By contrast, others will enter with a predisposition to do the right thing in their personal life, and can be guided to adapt what is virtuous in everyday life to professional life. It is even possible that those with morally ambivalent characters can—if the conditions are right—be encouraged to embark on a journey towards the development of altru-ethical professional moral character. This raises the question of what constitutes the most favorable conditions for achieving the four goals of ethical education, particularly that of professional character formation.

### **B. The Means to the Ends: Clinics, Character, and Educational Theory**

Unsurprisingly for two law clinic directors, we think that the answer lies in the in-depth and repeated involvement of students with actual clients who would not otherwise gain legal assistance, coupled with exposure to relevant theories of what it means to be ethical and altruistic, the literature on access to justice and opportu-

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<sup>86</sup> Norman Redlich, *Professional Responsibility of Law Teachers*, 29 CLEV. ST. L. REV. 623, 624 (1980). Regarding the potential impact of universities, cf Matthew L. Davidson, *Harness the Sun, Channel the Wind, The Art and Science of Effective Character Education*, in Lapsley & Power, *supra* note 78; Rosamond Rhodes & Lawrence G. Smith, *Molding Professional Character*, in LOST VIRTUE: PROFESSIONAL CHARACTER DEVELOPMENT IN MEDICAL EDUCATION (Nuala P. Kenny & Wayne N. Shelton eds., 2006).

<sup>87</sup> Sullivan et al., *supra* note 20, at 135.

nities for reflection on what is learned from these experiences. This view finds support in a long tradition of moral psychology that dates back to Aristotle and the philosophical tradition of virtue ethics.

Virtue ethics recognizes that individuals are not born with developed virtues, nor with the "practical wisdom" that enables them to decide how to act in specific situations. Instead, virtue, practical wisdom, and a person's overall moral character are gradually developed through actual engagement with moral issues. Whereas moral development usually starts with an application of rules before reaching the point where it involves instinctive and spontaneous moral responses,<sup>88</sup> character formation results not so much from direct teaching but from experiences in behaving morally, or what might be called a "moral apprenticeship."<sup>89</sup> In other words, "only someone who has had the experience of acting in a certain way is capable of knowing the principle embodied in that way of acting."<sup>90</sup> More specifically, by emulating others, by trial and error, by instruction from authoritative others, and by experiencing and reflecting on the appropriate pride or regret over the outcome of one's actions, moral habits or dispositions are said to gradually develop to the point that appropriate moral behavior and feelings become embedded in the individual's character.<sup>91</sup>

Admittedly, traditional forms of teaching in lectures, seminars, and tutorials, if they are conducted enthusiastically<sup>92</sup> and inno-

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<sup>88</sup> Aristotle, *THE NICOMACHEAN ETHICS* (1987), book X, ch. 10. *See also* Richard S. Peters, *MORAL DEVELOPMENT AND MORAL EDUCATION* (1981), ch. 2; Kupperman, *supra* note 43, at 203; Hubert L. Dreyfus & Stuart E. Dreyfus, *What Is Morality? A Phenomenological Account of the Development of Ethical Expertise*, in *UNIVERSALISM AND COMMUNITARIANISM* (D. Rasmussen ed., 1990).

<sup>89</sup> Peters, *ibid.*, at 37; David Carr, *EDUCATING THE VIRTUES: AN ESSAY ON THE PHILOSOPHICAL PSYCHOLOGY OF MORAL DEVELOPMENT AND EDUCATION* 43, 242 (1991).

<sup>90</sup> Robert Condlin, *The Moral Failure of Clinical Legal Education*, in *THE GOOD LAWYER* 323 (David Luban ed., 1983).

<sup>91</sup> *See* Aristotle, *supra* note 87, book II, chapter I and book VI, chapter XIII; Carr, *supra* note 88; David Luban, *Epistemology and Moral Education*, 33 J. LEGAL EDUC. 636 (1983).

<sup>92</sup> *Cf.* notes 56 and 57, *supra*.

vatively,<sup>93</sup> may inspire students' interest in ethics, illuminate relevant tools for handling legal ethics issues and the context in which they are handled, and provide opportunities for students to develop moral judgment through debating illustrative ethical dilemmas. However, such formal teaching is unlikely to be as effective in this regard as law clinic experience,<sup>94</sup> and certainly cannot involve the sort of moral apprenticeship envisaged by Aristotle and, more recently, the latest Carnegie report on legal education in the U.S.<sup>95</sup> Much of the benefit of live-client clinics is thought to stem from the fact that

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<sup>93</sup> E.g., academic debates can be brought to life by exposure to legal biographies, fictional accounts of legal practice in literature, films and television (see e.g. Carrie Menkel-Meadow, *The Sense and Sensibilities of Lawyers: Lawyering in Literature, Narratives, Film and Television, and Ethical Choices Regarding Career and Craft*, 31 MCGEORGE L. REV. 1, 61, 64-6 (1999); *Telling Stories in School: Using Case Studies and Stories to Teach Legal Ethics*, 69 FORDHAM L. REV. 787 (2000)), or even vignettes scripted and filmed by academics (Stephen Gillers, *Getting Personal*, 58 LAW AND CONTEMPORARY PROBLEMS 61 (1995); Edmund B. Spaeth, Janet G. Perry & Peggy B. Wachs, *Teaching Legal Ethics: Exploring the Continuum* 58 LAW AND CONTEMPORARY PROBLEMS 153, 159-60 (1996)), and the personal accounts of local lawyers, clients and those affected by lawyer behavior (Walter H. Bennett, *The University of North Carolina Intergenerational Legal Ethics Project: Expanding the Contexts for Teaching Professional Ethics and Values*, 58 LAW AND CONTEMPORARY PROBLEMS 173 (1995)).

<sup>94</sup> For other supporters of ethical education via live client clinics, see, e.g., Rhode, *supra* note 12, at 457-58; Aiken, *supra* note 63, at 47; Julian Webb, *Conduct, Ethics and Experience in Vocational Legal Education: Opportunities Missed*, in Economides, *supra* note 61, at 296; Andrew Boon, *Ethics in Legal Education and Training: Four Reports, Three Jurisdictions and a Prospectus*, 5 LEGAL ETHICS 34, 60 (2002); Deborah L. Rhode, *Into the Valley of Ethics: Professional Responsibility and Educational Reform*, 58 LAW & CONTEMP. PROBS. 139, 141 (1995). See generally Condlin, *supra* note 89, at 320-24; Luban, *supra* note 25; Luban, *supra* note 50; Nigel, Duncan, *Responsibility and Ethics in Professional Legal Education*, in EFFECTIVE LEARNING AND TEACHING IN LAW (Roger Burridge & Karen Hinett eds. 2002); Mary Jewell, *Teaching Law Ethically: Is It Possible?*, 8 DALHOUSIE L.J. 474, 507-10 (1984); Theresa Glennon, *Lawyers and Caring: Building an Ethic of Care into Professional Responsibility*, 43 HASTINGS L.J. 1175 (1992).

<sup>95</sup> See Sullivan et al., *supra* note 20, at 191-92. Indeed, the Report suggests that clinical experience with clients is "an essential catalyst for the full development of ethical engagement." *Id.* at 160.

handling real-life dilemmas and flesh and blood clients imparts immediacy and provokes an engagement with ethics that is lacking from didactic and even interactive forms of teaching, like tutorials, seminars, role plays and simulations. Students are more likely to be inspired to take ethics seriously by feelings of satisfaction that result from doing the right thing, and feelings of regret that result from moral mistakes. In general, students are likely to be motivated to act altruistically by seeing the impact of their actions on clients. Moreover, the “disorienting moments”<sup>96</sup> or “moral crises” that occur when prior assumptions and settled values are confronted by experienced reality may also stimulate an “engaged moral faculty.”<sup>97</sup> According to adult learning theory, learning experiences that are realistic and relate to the fulfillment of future social roles lead to more profound learning and greater self-knowledge than exposure to abstract knowledge.<sup>98</sup>

Engagement with real-life clients and actual ethical issues has other distinct advantages over traditional teaching, and even attempts to replicate real-life conditions through role-play and simulations. One advantage is that even the most realistic simulation is unlikely to engage student emotions to the same extent as being faced with actual clients and their legal problems. As we have seen,<sup>99</sup> this is important for the development of all four psychological components necessary for moral behavior, as well as the way in which moral decisions are implemented. Even the best ethics textbooks and simulations are not likely to produce the ability to notice “moral issues when they are embedded in complex and ambiguous situations, as they usually are in actual legal practice.”<sup>100</sup>

A second advantage of engaging with actual clients is that this always gives rise to a wide variety of issues flowing from the

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<sup>96</sup> Fran Quigley, *Seizing the Disorienting Moment: Adult Learning and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37, 37-72 (1996).

<sup>97</sup> Webb, *supra* note 61, at 290.

<sup>98</sup> See Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321, 321-54 (1982).

<sup>99</sup> See *supra* notes 47-51 and accompanying text.

<sup>100</sup> Sullivan et al., *supra* note 20, at 149.

fact that all relationships with other human beings involve subtle ethical issues. Students can be encouraged to act towards others with care, consideration, and respect, and will (almost of necessity) have to navigate problems of how to act in the best interest of clients without impinging on their autonomy. Additionally, students who develop empathy for their clients must learn to balance this with the need for effective professional judgment. To some extent, these issues can be built into realistic role plays and simulations, but they are likely to be raised in richer and subtler forms by actual clients, especially those from disadvantaged backgrounds and/or those who suffer from mental health, personality, or learning difficulties or who are otherwise vulnerable.

However, the fact that law clinic clients tend to come from disadvantaged backgrounds and cannot otherwise access legal services reflects a third advantage over all other forms of engagement with the ethics of legal practice. These types of clients present unparalleled exposure to the realities of problems of access to justice and social justice in general. Such clients are also most likely to evoke students' empathy, and to catalyze feelings of satisfaction where students are able to make a difference with regard to the clients' plights, or regret when they cannot. As asserted above,<sup>101</sup> it is these personal responses—pride in one's work and regret over the outcome of one's efforts—that are crucial in inculcating in students a continuing commitment to enhance access to justice, and even social justice in general. Clinics reveal that the extent of unmet legal need is great, that social and legal injustice is pervasive, that legal practice can involve helping others, and that this can be rewarding as well as intellectually challenging. Indeed, community work is said to enhance general moral development and not just a desire to promote social justice.<sup>102</sup>

Finally, if we recall the conditions regarded as conducive to the development of moral character, we can see why law clinics

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<sup>101</sup> See discussion *supra* and accompanying note 90.

<sup>102</sup> Judith A. Boss, *The Effect of Community Service Work on the Moral Development of College Ethics Students*, 23 MORAL EDUC. 2, 183 (1994); Narvaez & Rest, *supra* note 43, *passim*.



have distinct advantages over other forms of ethics teaching in ensuring that students start on a journey of character development that encourages ethical and altruistic behavior as a more or less spontaneous response to legal practice. Thus, depending on the aims and design of the clinic,<sup>103</sup> students may engage in repeated exercise of their moral muscles through dealing with a series of clients. This may lead to a concern for moral decision-making and moral behavior becoming second nature. Moreover, the fact that they take responsibility for actions with actual consequences for flesh and blood clients deepens reflections on appropriate behavior, sharpens lessons learned, and heightens the emotions felt after acting well or badly, which may in turn contribute to the development of moral courage.<sup>104</sup>

But, clinics do not just provide opportunities for the development of virtue through repeated ethical encounters. They also contain environmental conditions that enhance character development and involve students in the sort of “moral apprenticeship” that virtue ethics stresses is so important for character development,<sup>105</sup> and which reports on legal education have stressed is lacking in law schools.<sup>106</sup> Experienced students may act as role models for others and, through mentoring, both influence others and strengthen their own ethical and altruistic ethos. However, because of their perceived expertise, clinic supervisors are likely to be even more influential as mentors and moral exemplars, modeling good client relations, civility, the understanding that a client’s needs come before a lawyer’s interests, concern for how their actions affect others, and, if they are seen as exceeding their salaried role, an altruistic commitment to the community. Supervisors also help transmit the values of the profes-

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<sup>103</sup> See discussion *infra* Section II.

<sup>104</sup> Barry Schwartz and Kenneth Sharpe, PRACTICAL WISDOM: THE RIGHT WAY TO DO THE RIGHT THING 241-47 (2010) (citing William M. Sullivan, EDUCATING LAWYERS 121 (1st ed. 2007)).

<sup>105</sup> Carr, *supra* note 88, at 242; Peters, *supra* note 87, at 37.

<sup>106</sup> Sullivan, *supra* note 20, at 145-54. This report involved U.S. legal education, but arguably its conclusions are equally applicable to the U.K.

sion, especially when there is more than one supervisor.<sup>107</sup> Finally, they can guide students' reflection and place their experiences in context by introducing them to the academic literature on ethics and access to justice.

This latter function is extremely important because providing students with repeated opportunities to make ethical judgments and respond to real-life situations in role and in the moment is not, by itself, sufficient to ensure that all four moral components, especially moral sensitivity and judgment, develop appropriately. The potential for fostering ethical professionalism will be seriously under-utilized unless students are exposed to a theoretical basis that helps them make sense of their experiences.<sup>108</sup> As Schwartz and Sharpe assert: "[e]xperience must be structured in ways that cause wisdom to be learned."<sup>109</sup> Thus, without being alerted to the sort of ethical dilemmas that arise in practice, students might overlook those issues even when staring them in the face.<sup>110</sup> Without exposure to a wide variety of ethical theories or positions on issues of legal ethics, students will not have the opportunity to explore alternative approaches to resolving dilemmas, or to develop their own sense of professional values that are arguably necessary to supplement, and sometimes even supplant, existing professional roles and rules.<sup>111</sup>

Moreover, learning from experience "occurs not in the doing but in the reflection and conceptualization that takes place during

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<sup>107</sup> Cf. Lori L. Keating & Michael P. Maslanka, *Finding and Getting the Most out of a Mentor*, in *ESSENTIAL QUALITIES OF THE PROFESSIONAL LAWYER* 163 (Paul A. Haskins ed., 2013).

<sup>108</sup> Hamilton & Monson, *supra* note 21, at 352.

<sup>109</sup> Schwartz, *supra* note 103, at 272.

<sup>110</sup> See Sullivan et al., *supra* note 20, at 149 (discussing how moral and ethical dilemmas are frequently embedded in complex and ambiguous situations in actual legal practice, and that the ethics curriculum in most law schools, with its narrow focus on rules, may undermine law students' ability to recognize many such dilemmas as ethical issues). See also discussion *infra* and accompanying notes 217-25 and accompanying text (discussing this phenomenon among MHRC students).

<sup>111</sup> See discussion *supra* Section I(a)(ii).

and after the event.”<sup>112</sup> Through critical self-reflection, students in law school clinics “try on,” and begin to adopt and internalize a professional identity. They have the opportunity to observe and “consider systemic power dynamics, political and social realities, and economic forces,” as they develop greater self-awareness and moral sensitivity.<sup>113</sup> Such reflection, aided by the critical evaluation of others, may help students arrive at guiding moral principles “that have been experienced pre-reflectively and internalized as dispositions.”<sup>114</sup> More generally, they may develop the life-long learning skills of the reflective practitioner.<sup>115</sup> Thus, according to Kolb’s well-known learning circle,<sup>116</sup> reflection may lead to the adoption of new, or the adaptation of existing, theories about how to handle issues (including moral issues), which can then be put into practice when similar situations arise. This new experience provides the material for further reflection, theory adaption, and theory testing, and so on. Moreover, it seems obvious that the more opportunities for experience and reflection students confront, the more sophisticated their theories will become, and the more habitual the resultant behavior will be.<sup>117</sup>

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<sup>112</sup> See Hugh Brayne, Nigel Duncan & Richard Grimes, CLINICAL LEGAL EDUCATION: ACTIVE LEARNING IN YOUR LAW SCHOOL (1998).

<sup>113</sup> Timothy Casey, *Reflective Practice in Legal Education: The Stages of Reflection*, 20 CLINICAL L. REV. 317, 344 (2014) (arguing for structuring reflection to reflect stages of cognitive, self-awareness and moral development). See generally Schwartz, *supra* note 103, at 247.

<sup>114</sup> Robert J. Condlin, “Practice Ready Graduates:” A Millennialist Fantasy, 31 TOURO L. REV. 75, 93 (2014).

<sup>115</sup> Donald A. Schön, THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION (1983). See also Aiken, *supra* note 63, at 26; Webb et al., *supra* note 59, at 289-90; Howard Lesnick, *Infinity in a Grain of Sand: The World of Law and Lawyering as Portrayed in the Clinical Teaching Implicit in the Law School Curriculum*, 38 UCLA L. REV. 1157, 1184-85 (1990); Paul J. Spiegelman, *Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake’s Ladder in the Context of Amy’s Web*, 38 J. LEGAL EDUC. 243, 243-70 (1988).

<sup>116</sup> See e.g., David A. Kolb, EXPERIENTIAL LEARNING: EXPERIENCE AS THE SOURCE OF LEARNING AND DEVELOPMENT 33 (1984).

<sup>117</sup> See Schwartz, *supra* note 103, at 81-106 (describing the development of moral habits).

## II. CREATING CONDITIONS CONDUCTIVE TO A CLINICAL EFFECT

Thus, we see law clinics as providing an ideal opportunity for students to achieve ethical praxis—the synthesis of ethical theory and behavior. We believe that students’ real-life experiences in their clinical work, and guided reflection with teachers on those clinical experiences, grounds ethical development that will inform students’ professional lives, help them develop the Aristotelian virtue of *phronesis*, or practical wisdom,<sup>118</sup> and start them on a journey towards the development of a professional identity or professional moral character that is based on altru-ethical professionalism. But, while law clinics are ideally placed to foster moral development, in reality this is not their only, or usually their primary, goal. Nor should it be. A large portion of law clinics (what Nicolson has called educationally-oriented clinics)<sup>119</sup> are aimed primarily at developing legal skills and providing a realistic understanding of substantive areas of law. However, given that it is usually the most vulnerable members of society who seek law clinic assistance, this involves students “practicing on the poor,”<sup>120</sup> rather than for the poor. Moreover, if such clinics were also aimed at inculcating ethical values, they would ironically run the risk of undermining the notion of altru-ethical professionalism, or even more traditional ideas of professionalism, by conveying the implicit message to students that their interests—now educational, later commercial—take precedence over those of clients. By contrast, clinics like the MHRC and USLC whose primary goal is to provide legal services to those most in

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<sup>118</sup> See Aristotle, *supra* note 87, bk. X, ch. 10; Martha C. Nussbaum, *Non-Relative Virtues: An Aristotelian Approach*, 13 *MIDWEST STUD. PHIL.* 32, 51 (1998).

<sup>119</sup> See Nicolson, *supra* note 11, at 3.

<sup>120</sup> Margaret Thornton, *PRIVATISING THE PUBLIC UNIVERSITY: THE CASE OF LAW* (2010) 83. See also Nicolson, *supra* note 11, at 5; Richard Lewis, *Clinical Education Revisited* 14 (2000); Stephen Wizner & Jane Aiken, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 *FORDHAM L. REV.* 997, 1007 (2004).

need (social justice-oriented clinics) avoid this problem by modeling an ideal of altruistic service.

Prioritizing the enhancement of access to justice over student education has both advantages and disadvantages in terms of fostering ethical development. The first advantage is that students in both clinics undertake relatively high caseloads. Over the course of their year-long involvement, MHRC students (typically 14 second-year or third-year students) handle on average twelve cases, usually six to eight at a time. Although the MHRC is a generalist clinic that does not specialize in one area of law, because it is a population-based clinic—serving the general legal needs of individuals referred by healthcare provider partners—the majority of its cases involve access to subsistence benefits, Social Security, disability, healthcare and immigration. The USLC is also a generalist clinic, but around 80% of cases involve employment, consumer, and housing issues. Although its students take on fewer cases over the course of the academic year (usually between 2 and 4), because their clinic involvement is largely extra-curricular it can be much longer—up to five years, depending on the student's stage of entry and degree program. Students' activities often extend beyond the civil cases which form the bulk of casework to include investigating miscarriages of justice and/or engaging in various forms of public legal education and/or law reform work. Furthermore, students can remain involved during vacation, when caseloads are typically much higher. Consequently, average caseload levels are similar to those in the MHRC—though for each student, more varied. Some students take on only a handful of cases, whereas one (admittedly part-time) student has racked up more than 70 cases!<sup>121</sup> Moreover, in both clinics, a small number of

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<sup>121</sup> Of the 23 students whose journal diaries were analyzed by Nicolson, the average number of cases they had taken on was 4.75, but some had taken on as many as 12, and all had at least one—but in some cases, three—more years of clinic involvement to come; in the study set out below, the average number was much higher, at just over 9.5 cases each (though this was skewed upwards by two students who had undertaken 31 between them) notwithstanding that most were earlier in their stage of clinical involvement (seven were graduate entrants with two years' worth of clinic experience and one or two more years to follow; two were undergraduates with three years of experience and two years to follow).

students (annually, around four at the MHRC and six at the USLC) are provided with more indirect exposure to ethical issues in that they formally mentor less experienced clinic members. In addition, the USLC is run by a committee of academic staff and around 24 students who occasionally are required to deal with ethical issues in cases, while all USLC students are required to attend at least one Initial Advice Clinic, where they triage and sit in on interviews conducted by qualified lawyers on a pro bono basis, and thus may observe these volunteer lawyers responding to ethical issues.

More importantly, for those USLC students who choose to engage in some form of clinical education, exposure to ethical issues arising in actual cases is significantly expanded through class discussion in weekly “surgeries” where they present ethical issues raised by their cases for discussion. Similarly, MHRC students all attend weekly classes that include structured “case rounds” during which students present ethical and other dilemmas that are raised by their cases for class discussion, and reach some consensus on suggested resolutions. Each MHRC student also meets weekly on an individual basis with his or her student mentor and faculty supervisor to discuss in detail each case—including ethical problems presented. In particularly difficult cases, a student may be asked to present the case and particular ethical problems to the weekly “firm meeting,” of staff and faculty.

High caseloads also bring home the message that there is a dire need for legal service by many community members. This is particularly true for MHRC students, whose clients come from some of the most vulnerable and underserved sectors of the Miami community. For example, during the 2013-2014 academic year, approximately two-thirds of the Clinic’s 144 clients did not speak or read English, with 44% speaking Spanish primarily or exclusively, and 19% speaking Haitian or Creole, while 95% belonged to racial or ethnic minorities.<sup>122</sup> In addition, more than 55% of the Clinic’s

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<sup>122</sup> 47% were African American or Black (including Haitian and other Caribbean), and 48% were Latino or Hispanic.

clients were affected by HIV/AIDS, and at least one third were homeless.

By contrast, while theoretically the USLC will take on any matter except child custody cases (which are too important and potentially harrowing to be entrusted to students as young as 17), relatively generous legal aid provisions in Scotland effectively mean that it only deals with very low income groups who have cases for which there is no legal aid (such as representation in small claims courts), or for which no legal aid lawyer will act. The upshot is that a large proportion of clinic work involves clients facing the problems associated with the “middle-income gap” rather than those challenging the allocation of state-funded subsistence benefits. Recently, though, USLC has begun to deal with destitute asylum seekers, those with HIV/AIDS, and survivors of sexual violence.

It is true that students in both clinics face anxiety about student debt (though to a lesser extent in Scotland, where fees are low and covered by the state for undergraduate as opposed to postgraduate students).<sup>123</sup> Nevertheless, compared to their clients, most students in both clinics come from relatively privileged backgrounds and thus will not be prepared for the levels of legal need and the impact of deprivation in their clients’ lives. Being newly exposed to “the realit[ies] of people they perceived as different,” there is a high likelihood that students will experience the “disorienting moments” that are said to involve profound learning experiences,<sup>124</sup> and develop empathy through learning about the lives of others as they work closely with clients whose life experiences are so different from their own.<sup>125</sup> This is especially true of the Miami students, whose clients are often from a different race, ethnicity,

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<sup>123</sup> Nevertheless, virtually all Strathclyde students have part-time jobs to pay for living costs and if they are graduate entrants for fees. In the U.S. legal education is largely financed through student loans and many students graduate \$200,000 or more in debt.

<sup>124</sup> Aiken, *supra* note 63, at 38; Quigley, *supra* note 95, at 52.

<sup>125</sup> See Sullivan et al., *supra* note 20, at 146.

country or culture, and whose cases are often of crucial importance to them.<sup>126</sup>

The final advantage of both clinics' social justice orientation is that the desire to maximize the number of clients served means that students work largely independently of their supervisors to interview clients and to pursue their interests, and are thus exposed to and have to take responsibility for ethical decision-making in all stages of representation, from interviewing, through letter-writing and negotiation, to representing clients in court.<sup>127</sup> Given that the USLC has more than 280 student advisors, but only the resources to employ three part-time supervisors (at a staff-student ratio of around 1:150!), supervision is relatively hands-off, and based largely on checking the final product of student work, such as letters or pleadings.<sup>128</sup> The Miami Health Rights Clinic students are at once both more and less closely supervised than their Scottish counterparts. Fewer students, and a lower staff-student ratio (1: 9),<sup>129</sup> result in more time spent supervising individual students formally and informally. Supervision occurs not only in the weekly one-on-one meetings with students but also in countless informal exchanges between faculty member and student, on campus, on the phone, and via email and text. However, the very high and demanding caseloads carried by the MHRC students, and the fact that many of the students' interactions with clients, and governmental agencies take place off campus, frequently result in a similar, though slightly less hands-off approach as that in the USLC.<sup>130</sup>

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<sup>126</sup> Scottish society is far more homogenously white, and there is no noticeable overrepresentation of ethnic minorities amongst USLC clients.

<sup>127</sup> Usually, at USLC, the small claims court or employment tribunals, though students can now represent clients in all courts other than the highest.

<sup>128</sup> Despite this, the clinic's rate of obtaining some form of positive result for the client in cases going beyond advice only is over 90%.

<sup>129</sup> During the year that this study was conducted there were two supervising attorneys in the MHRC, with eighteen students, though the supervising attorneys had other faculty duties.

<sup>130</sup> Cf. Carolyn Grose, *Flies on the Wall or in the Ointment? Some Thoughts on the Role of Clinic Supervisors at the Initial Client Interviews*, 14 CLINICAL L. REV. 415, 435 (2008) (discussing Newman's supervision style).



At the same time, however, even if students are exposed directly and indirectly to a sufficient number of cases, it is undoubtedly the case that, as with clinical legal education generally<sup>131</sup> the demands of serving clients impinge on time for guided reflection and ethics education. While both clinics experience this tension, the balance between service and education is drawn differently in each.

The USLC was established with the primary aim of providing legal services to those who cannot afford a lawyer or who qualify for legal aid, but also in the hope that playing this role would inspire a new generation of lawyers to see enhancing access to justice as part of their professional moral obligations. Initially, student participation was entirely extra-curricular, and formal education was limited to induction training necessary to give the students the skills to assist their clients. Later, educational programs were grafted onto this social justice-oriented clinic. First, an optional Ethics and Justice class was designed to explore issues of legal ethics and access to justice in the context of students' clinical experience. More recently, the success of this class led to the establishment of a Clinical LLB (henceforth CLLB) that integrates all aspects of clinical experience into the standard LLB curriculum (which for graduate entrants can be limited to two years of study, but for undergraduate honors students may last for four years).<sup>132</sup> Because Ethics and Justice is a compulsory class for CLLB students, more USLC students now gain an in-depth exposure to issues of legal ethics and access to justice than before, though such exposure remains limited to a third of USLC students. The remaining students are, however, provided with two-hour "crash course" in their induction training designed to sensitize them to the sort of ethical issues that might arise in their cases and provide them with strategies for their

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<sup>131</sup> Cf. Aaronson, *supra* note 50, at 286.

<sup>132</sup> Students must take a minimum of one-third of their credits via a class that is wholly or partly of a clinical nature. Four of these are compulsory (including Ethics and Justice) and the rest involve students replacing part of the assessment in one of their standard classes with an assignment involving reflection on the law, justice and/or ethics of a clinic class relevant to the class in question. For further detail, see Nicolson, *supra* note 18, at 51-55.

appropriate resolution,<sup>133</sup> This session also provide a basis for reflection by CLLB students on ethical issues which arise in their cases when they commence writing fortnightly diary entries in the semesters before they take the Ethics and Justice class in their final year.

By contrast, the MHRC is committed to both serving the interests of justice and educating law students. The latter goal explicitly encompasses instilling high standards of ethics and professional responsibility, assisting students in the formation of an ethical professional identity,<sup>134</sup> and encouraging students to take on work that assists underserved and impoverished clients, whether through pro bono work or a public interest career. The MHRC's educational component also provides training in fundamental lawyering skills, making students more confident in their decision-making role as clients' advocates, and enhancing students' understanding of how legal doctrine and institutions operate in individual cases. Like the USLC, the MHRC also focuses on developing law students' ability to engage in self-reflection and introspective professional development. Inevitably, given the wide range of goals addressed in the year-long class, less time can be devoted to issues of ethics and justice. Thus, compared to the Strathclyde Ethics and Justice class, which devotes eight seminars to legal ethics and professionalism, and four to issues of access to justice,<sup>135</sup> along with 10 case

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<sup>133</sup> For further discussion of this issue, see *infra* notes 200 and 325-26 (showing that this aim is not always successful).

<sup>134</sup> Cf. Sullivan et al., *supra* note 20, at F.

<sup>135</sup> Typically, seminars cover: an introduction to clinical teaching methods, legal professionalism with special reference to access to justice obligations; methods for ensuring ethical behavior—education, codes and other regulatory strategies; the lawyer/client relationship—autonomy, paternalism, and empathy; immoral client ends; immoral tactics; confidentiality; conflicts of interests; access to justice and unmet legal need; public interest litigation; the structure of the legal profession and access to justice; access to justice and law centers; franchising legal aid services; conditional fee arrangements; and multi-party claims (class actions). However, there is the flexibility to replace certain topics with those identified by students as raising particular problems, such as dealing with clients with mental health problems.

surgeries in which students discuss ethical issues arising in their cases, the focus in the MHRC is more broad.

There are two other differences between the clinics that affect their potential to develop or at least sustain an existing commitment to altruistic service to the community. One is the fact that the USLC assesses each of the roughly 120 students who apply to join the clinic each year on their commitment to further social justice goals rather than their own educational and vocational needs, and whether they show the attributes required to treat clients with sensitivity, care and consideration. This results in roughly 50% of applicants being denied a place, though some gain entry in subsequent years, particularly if they undertake internships in advice agencies, or join as associate members and take on non-client facing work such as online advice, street law or investigating miscarriages of justice. By contrast, the MHRC does not screen or qualify students based on pro bono or altruistic inclinations, and initially enrolls a majority of students whose primary interest in the clinic is skills training, even though the students are made aware of the clinic's explicit social justice goals when enrolling. Theoretically, this means that a greater percentage than at the USLC can be influenced to develop a commitment to assist those most in need. In practice, however, the fact that it is so difficult to develop in a short space of time a commitment to altruism which is likely to withstand the pressures of professional and personal life suggests that the USLC has the greater potential to affect student behavior because of their much longer clinic participation.

This conclusion is strengthened by the second difference between the two clinics, namely the way that they are organized and run. Organizationally, the MHRC is a fairly typical US clinic in the sense that it is run by law school staff, and students are involved for a finite period in a discrete clinic. The USLC model is radically different in that the students play a central role in not just running the clinic, but also more crucially in deciding the clinic's direction, and safeguarding the clinic's values and ethos. This has two relevant consequences.

One is that according to research, this should create in the students a sense of "psychological ownership" of the clinic, which

will incentivize them to go the extra mile in fulfilling their responsibilities.<sup>136</sup> Such behavior is obviously beneficial to clients and the community in that it expands services in a cost-effective way and models altruism, responsibility and commitment to other students. Secondly, students' long-term involvement in a distinct organization, with a constitution, elections and formal appointment process for committee positions, creates conditions conducive to a strong and cohesive ethos. Moreover, this can be transmitted through committee meetings, meetings of the eight "firms" into which all students are organized, and an Annual General Meeting at which prizes for outstanding service are awarded. Students also participate in formal and informal social events, and other forms of socialization that arise when people work closely and form friendships with like-minded colleagues.<sup>137</sup> Arguably, informal socialization within the peer group may be as, if not more, effective than any message transmitted by paid law school staff, though, here, students are aware that all law clinic staff work far longer hours than they are paid for, and that the Clinic's Director is a full-time academic with the same teaching and research duties as his non-clinic colleagues. Although the MHRC students similarly participate in numerous informal social events and have developed a distinct camaraderie and ethos, also influenced by similar dedication of time by staff and professor, the "ownership" of the MHRC very much remains with

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<sup>136</sup> See, e.g., Mary A. Konovsk & S. Douglas Pugh, CITIZENSHIP BEHAVIOUR AND SOCIAL EXCHANGE, 37 ACAD. MGMT J. 656, 666-68 (1994); Jon L. Pierce, Tatiana Kostova & Kurt T. Dirks, *Towards a Theory of Psychological Ownership in Organisations*, 26 ACAD. MGMT REV. 289, 299 (2001); Michael P. O' Driscoll, Jon L. Pierce & Ann-Marie Coghlan, *The Psychology of Ownership: Work Environment Structure, Organizational Commitment, and Citizenship Behaviours*, 31 GROUP MGMT 388, 390 (2006); Steven H. Wagner, Christopher P. Parker & Neil D. Christiansen, *Employees That Think and Act Like Owners: Effect of Ownership Beliefs and Behaviours on Organisational Effectiveness*, 56 PERS. PSYCHOL. 847, 868 (2003).

<sup>137</sup> Elton F. Jackson, Mark D. Bachmeier, James R. Wood & Elizabeth A. Craft, *Volunteering and Charitable Giving: Do Religious and Associational Ties Promote Helping Behavior?*, 24 NON-PROFIT & VOLUNTARY SECTOR Q. 59, 62-64 (1995).

the faculty and thus USLC's students have a longer-term investment and role to play in the Clinic, which may lead to higher levels of commitment.<sup>138</sup>

### III. EVIDENCING THE CLINIC EFFECT

#### A. Reflections Captured—The Source of the Evidence

Having explored the somewhat different potential of the two clinics to influence the ethical development of their students, we now turn to examine the evidence for any such effect. Such evidence in both cases derives from the words of the students themselves that they are required to write as part of their clinical learning experience. Again, there are important similarities and differences between the two clinics. Having analyzed the reflections of our students, we observed significant typological differences in at least six areas, though many of these differences can be situated along a continuum and in some case both axes of a typological modality are combined. First, there is a difference as to how much theory and instruction on theory precedes clinical students' experience and then reflection on the experience. Newman spent less time up front on theory (though she did touch on it in initial orientation as well as early clinic seminars), while we have seen that Nicolson provides all clinic students with a two-hour crash course in legal ethics designed to sensitize them to commonly arising issues and to encourage reflection on them in their diaries. Second, reflection can be oral or written, with Newman relying more on oral reflection than Nicolson, thus partially accounting for the brevity of MHRC student writings. Third, reflection can focus on summative elements or be episodic and ongoing, with, again, Newman requiring short summative reflection written pieces from her students and Nicolson requiring longer (sometimes weekly) reflections from the USLC students, leading to the fourth typological distinction—brief or extensive reflection. Fifth, the written reflection exercises Newman gave her students were very directive, while Nicolson's were far more broad and

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<sup>138</sup> See discussion *infra* Section IV.

open-ended. Lastly, we noted the educational value of dialogue (whether oral or written), with the student's instructor (and others, where possible). In this regard, we also observed differences between our instructional roles. Newman is both the professor teaching clinic and ethics and the practicing attorney directly supervising her students and thus has greater opportunity for oral dialogue, while Nicolson does not directly supervise the legal work of the students at USLC and thus conducts his dialogue with the students in writing. However, both authors open up reflection to a wider group thus transforming the reflective dialogue into a more wide-ranging conversation.

Turning to the details of the reflection process in each clinic, the MHRC captures student reflection in a formal "self-evaluation" at the mid-point of each semester (meaning that it covers less than a full academic year). These self-evaluations are referred to in the analysis that follow as "Miami, Fall 2013" or "Miami Spring 2014" to denote the two different semesters in which they were recorded. Students are asked a series of specific questions on 15 separate topics designed to uncover their progress toward meeting the Clinic's learning goals.<sup>139</sup> The majority of these topics relate to specific practical skills and competencies (such as client interviewing, legal research, maintaining case files), while some relate to professional attributes (such as being a team player). Others involve more general topics such as those entitled "Reflective Practitioner" and "Professionalism," and one is titled "Ethical Issues."<sup>140</sup> On each topic, a specific set of prompts is given. For instance, on the "Reflective Practitioner" topic, students are asked: "What successes do you feel you have had? What challenges have you experienced?

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<sup>139</sup> MHRC's Learning Goals consist of a variety of professional skills and values. On the values side, the Learning Goals include client empathy, a practice of self-reflection, sensitivity to race and cultural issues, integrity, honesty and teamwork. Available at: [http://www.teachinglegalethics.org/sites/default/files/LEARNING%20GOALS%20\(3\).pdf](http://www.teachinglegalethics.org/sites/default/files/LEARNING%20GOALS%20(3).pdf)

<sup>140</sup> As a result of focusing on ethical development in this study, MHRC seminar lectures, discussions and case rounds now articulate more explicitly a definition of "ethical issues" that is not merely code or rule-based. See discussion *infra* Section IV.

What do you wish to improve? Are you having a good time? Do you enjoy being a lawyer? What in particular do you enjoy or dislike?" More pertinently, on Professionalism, they are asked: "Have you conducted yourself in a professional manner with integrity and honesty? Have you been honest with yourself, your clients and your supervisors? How do you think others perceive you as a professional?" On "Ethical Issues" they are prompted to "describe any ethical issues that have arisen during your client representation. How were you able to spot the issue? How did you address the issue? What if any, ethical issues are you concerned about?" In a specific effort to capture professional growth, most prompts differ between the first and second semesters.<sup>141</sup> For example, in the second semester, in relation to "professionalism," they are asked: "What impact has your clinical experience had on your professional identity as a lawyer?" and on being a reflective practitioner, they are asked: "How do you think you have changed as an advocate and a lawyer?" While most of the prompts do not explicitly mention ethics, many of them elicit reflection on developing professional values—from individualized assessments of personal character and integrity, and habits of reflection, to broader issues of the role of lawyers in providing access to justice. Indeed, many of the directive MHRC prompts ask students to reflect on how they treat clients and others, as well as what kind of lawyer they want to be.

The MHRC students are encouraged to limit their self-evaluations to three pages. After reviewing the self-evaluations carefully, and after considering independently each students' progress toward the goals, the two supervisors meet individually with each student at the mid-semester point to review and reflect on the student's work. Faculty and senior student mentors also meet individually with each student on a weekly basis to orally review the student's cases and provide further feedback and opportunity for reflection though these reflections are not captured in writing, nor are the frequent class case rounds sessions which involve a conversation amongst the entire class on particular ethics issues raised by students.

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<sup>141</sup> Notably, however, the prompts associated with "Ethical Issues" remained the same.

Compared to the summative nature of MHRC student reflections, written reflection at Strathclyde is an ongoing process—what can be called episodic reflection in that students concentrate on writing about experiences as they arise. When they take the Ethics and Justice class, CLLB students are required to reflect weekly (though they only submit ten entries), but in their other semesters only fortnightly (six entries in total). Graduate entrants taking the accelerated CLLB write diaries in three out of four semesters, whereas undergraduates write diaries in four out of six semesters. Each entry is a maximum of 500 words, and students are given the opportunity to submit their entries at two stages during the semester for comments by the class co-coordinator. They then have a maximum of 200 words with which to respond to these comments. In addition, they are encouraged but not required to submit an “introduction (maximum length 500 words) providing a narrative to the diary and calling attention to any noteworthy aspects of the reflection process.” Unlike the directed nature of MHRC reflection, for the Ethics and Justice class students are simply instructed to reflect on their “activities in handling cases and participation in case surgeries, as well as ... performance, what they are learning from the class and from their clinical experience, and how they might improve their performance,” though this is fleshed out at a first seminar meeting which contains a discussion on the theory and techniques of good diary reflection, by the provision of examples of good diaries from previous years. The topics for reflection for the general CLLB diaries are even more open-ended, as the following instruction shows: “Relevant experiences on which you can reflect will include, most obviously, any case work, but also Clinic training, attendance at an IAC [Initial Advice Clinic], and attendance at surgeries. As long as it somehow illuminates one of your various clinic activities, you may even reflect on what you have learnt in the standard LLB from, for example, classes in Legal Process on access to justice, classes in Legal Theory on substantive justice or ethics, and any class in which you learn law relevant and helpful to the conducting of one of your cases.” USLC students were thus given



much greater autonomy than MHRC students on what to focus on in their reflective journals.

To ensure consistency between the dairies of graduate entry Strathclyde CLLB students' and their undergraduate counterparts (who because their course is longer, wrote more dairies) in analyzing the dairies, we ignored the latter's first set of dairies. In order to assess the effect of the Ethics and Justice class on students' ethical awareness, we analyzed dairies of the students enrolled in the Ethics and Justice seminar before, throughout, and after concluding the course. In the analysis the Ethics and Justice dairies are designated as "Strathclyde Fall 2013 with the dairies preceding them as "Strathclyde Spring 2013" and those following the Ethics and Justice dairies as "Strathclyde Fall 2014" with the reference to the particular week indicating when in the relevant semester the entry was made. Had all Strathclyde students utilized the maximum word limit, this would have resulted in 21,000 words of reflection to analyze, but not all students took advantage of the full word limit and the opportunity to submit their dairies for comments and only about a third took the opportunity to provide an introduction to their dairies. Nevertheless, data from the USLC students was far more extensive than that of Miami students, with the longest combined self-evaluation just over 5,000 words (including some repetition of the topic prompts), and the shortest one just over 3,000 words.

The quality of student reflection in the MHRC was also rather different to that of USLC students. Being required to comment on fifteen topics with space constraints meant that students did not provide extensive and expansive reflection on one or two issues but rather a modest amount on each required topic. As a result, reflection was sometimes confined to perfunctory or bland comments on topics where students appeared only to comment because they were required to do so, meaning that there was less space to develop more noteworthy issues. The fact that reflection topics were set by teaching staff also means that we can read far less into their choice of subject-matter than that of USLC students, who chose what to discuss within only very general parameters.

## B. Reflections Analyzed—Methodology

Turning now to our analysis of the students' reflections itself, we utilized two forms of qualitative research methodology that are often used—and increasingly in combination<sup>142</sup>—in evaluating effective teaching and educational outcomes: grounded theory<sup>143</sup> and narrative inquiry analysis.<sup>144</sup> Grounded theory involves breaking down data from large samples into component parts; these components are then grouped and named based on themes that are identified, and the researcher engages in constant comparison and contrast of the concepts that emerge.<sup>145</sup> Thus in our initial review of the students' reflections we used a grounded theory approach. While we had already read our own student's reflections when they were submitted for assessment, when we came to analyzing them for research purposes, we first closely read both sets of data in their entirety closely for the purpose of identifying what ethical issues were discussed, whether there was evidence of moral development and professional identity formation, and what influenced these processes. While we began with the themes Nicolson had identified in his previous study,<sup>146</sup> as is common with this methodology, new themes and subthemes emerged and earlier ones were modified with repeated re-readings of the data.<sup>147</sup> Moreover, comparison of the two data sets revealed various patterns of similarities and differences between the two student cohorts. Lastly, we extracted and reproduced representative quotations to represent the

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<sup>142</sup> This is especially the case as regards the constructionist camp of grounded theory, in which the researcher constructs meaning from the extracted themes throughout the data.

<sup>143</sup> See Alan Bryman, *SOCIAL RESEARCH METHODS*, 541-45, 694 (2008).

<sup>144</sup> See generally Shalini Lal, Melinda Suto & Michael Ungar, *Examining the Potential of Combining the Methods of Grounded Theory and Narrative Inquiry: A Comparative Analysis*, 17 *QUAL. REPORT* 1, 2-3 (2012).

<sup>145</sup> See Bryman, *supra* note 142, at 567-68.

<sup>146</sup> *Supra* note 17.

<sup>147</sup> See Bryman, *supra* note 142, at 568.

themes and patterns identified,<sup>148</sup> and organized them to produce a coherent narrative,

While we primarily utilized a grounded theory methodology, because we were analyzing students' narratives that reflected what meaning they derived from their individual experiences in the law clinics, we also utilized elements of narrative inquiry. This methodology involves a thematic analysis of the personal accounts of individuals of their lived experiences in order to understand how the individual has derived meaning from experience and constructed self-identity.<sup>149</sup> Narrative inquiry typically analyzes both the story that an individual tells and the manner in which that story is told, and usually focuses on a relatively small sample. To that extent, our methodology differs from narrative inquiry in that we concentrated only on the content of what was written and analyzed 22 diary entries from seven graduate entrants and 28 entries from two undergraduate Strathclyde students, and 24 three page self-evaluations from the Miami students. But like narrative inquiry, we drew on information out with the written data to help explain or draw conclusions from the narratives.<sup>150</sup> Thus, we "filled in" our students' stories with our own personal knowledge of their performance and development. In other words, we added our stories about our students to their own stories.

Narrative inquiry is typically further characterized by a meaningful relationship between the researcher and subject, which must be acknowledged as potentially having an impact on the individual and his or her narration.<sup>151</sup> And here our relationship with the students undoubtedly influenced their narratives. Thus, elements

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<sup>148</sup> See generally Douglas Ezzy, QUALITATIVE ANALYSIS: PRACTICE AND INNOVATION 80-85 (2002).

<sup>149</sup> See Donald E. Polkinghorne, NARRATIVE KNOWING AND THE HUMAN SCIENCES 149-50 (1988); Dan P. McAdams, *Personal Narratives and the Life Story*, in HANDBOOK OF PERSONALITY: THEORY AND RESEARCH 655 (Oliver P. John et al. eds., 2008). See Margarete Sandelowski, *Telling Stories: Narrative Approaches in Qualitative Research*, 23 J. NURSING SCHOLARSHIP 161, 161-65 (1991).

<sup>150</sup> See Susan E. Chase, *Narrative Inquiry: Multiple Lenses, Approaches, Voices*, in THE SAGE HANDBOOK OF QUALITATIVE RESEARCH 660-65 (Norman K. Denzin & Yvonna S. Lincoln eds., 3rd ed., 2005).

<sup>151</sup> See Sandelowski, *supra* note 148, at 162.

of the narratives were possibly co-constructed between teacher and student, especially because we used the narratives of our students to both measure their progress and grade their performance in terms of whether they have met our teaching aims. Even more problematically, in a variant of what has been termed a “reactive effect,” common in research where there is a close relationship between the researcher and the subject,<sup>152</sup> some students may well have “played to the gallery” by expressing views that they assumed would find favor with us. While we cannot state with certainty to what extent this may have occurred, at least in some cases the sincerity of student statements could be confirmed or undermined by their actual actions, especially in the MHRC where the faculty observes and reviews on a weekly, if not daily, basis actual student behaviors. Moreover, as demonstrated in Nicolson’s earlier study,<sup>153</sup> some USLC students are prepared to express views that they know will challenge those of their tutors.

In addition to these specific risks, all qualitative research has weaknesses flowing from the inevitability of subjective interpretation based on biases or pre-conceptualizations of the researcher. However, in an effort to reduce some of these risks that we might have overlooked or re-interpreted data which conflicts with what we expected or wanted to find, each author undertook a “blind” reading of the student reflections produced by the other’s clinic students with the purpose of determining whether they identified other themes or indeed were unconvinced by the other’s reading. Nevertheless, given that both of us were interested in finding evidence of clinical impact on ethical professional development, this cross-reading only reduced rather than eliminated problems inherent in all qualitative research methods, though it did lead to comparative insights which would have been unlikely without it.

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<sup>152</sup> See Bryman, *supra* note 146, at 266.

<sup>153</sup> *Supra* note 18, at 49.

### C. Evidence of the Clinic Effect(s)

#### (i) Introduction

Having described the methodology of our analysis of the student reflection, we now turn to our story of their stories. The headline for that story would read that both the self-evaluations of the Miami students and the diaries of the Strathclyde students show them displaying ethical awareness and judgment through reflection on a wide spectrum of ethical issues. At one end, these involved everyday issues of how to interact with other human beings and particularly their clients in a way that reflects common decency, respect, care, consideration, empathy, and that respect for their autonomy as a human being—what we call called micro-ethics or interpersonal ethics. At the opposite end of the spectrum, students addressed macro-ethical issues involving law and social justice and, most importantly for the argument about altru-ethical professionalism, concerns about access to justice. Falling between these two ends are a number of issues which we will describe as meso-ethical for want of a better word,<sup>154</sup> and which involve more standard issues found in codes of ethics and discussed in the legal ethics literature revolving around the clash between personal morality and professional role morality: should lawyers represent and do all they can within code and legal rules to further their clients' interest irrespective of the morality of such actions; should they breach confidentiality to prevent harm to others, etc. even without breaching the codes or law. While there is considerable fluidity between these three broad categories of ethical issue,<sup>155</sup> and one could categorize

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<sup>154</sup> Cf. Derek Morgan, *Doctoring Legal Ethics: Studies in Irony*, in LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY 203, 212 (Ross Cranston ed., 1995); see also Abraham Edel, *Ethical Theory and Moral Practice: on the Terms of Their Relation*, in NEW DIRECTIONS IN ETHICS: THE CHALLENGE OF APPLIED ETHICS 317, 322-23 (Joseph P. DeMarco, Richard M. Fox & Michael D. Bayles eds., 1986) (explaining other, although slightly different use of the terms, "micro" and "macro" ethics); D.R.F. O'Dair, *Ethics by the Pervasive Method—The Case of Contract*, 17 LEGAL STUDIES 305, 312 (1997).

<sup>155</sup> For example, lawyers who humiliate or intimidate other human beings can be said to contravene micro-ethical values, but when this is done in order to promote

micro- and meso-ethical issues under a single category of “ethics” to distinguish them from questions of altruism, we think that they provides a useful means of categorizing our analysis of student reflection which reflects our view<sup>156</sup> that altruistic service to those most in need is a professional ethical obligation as much as zealously representing clients or upholding confidentiality. The other headline of our story about the students’ reflection is that, while, as we shall see, there were differences between the two cohorts as to the type of micro-ethical issues discussed, both cohorts seemed to encounter far fewer meso-ethical issues than micro-ethical issues relating to interpersonal relations or the macro-ethics of the law’s content or access to justice.

(ii) Micro-ethics

While traditional ethics have focused on abstract and only rarely arising issues of justice, life, death, and formal obligations such as promise-keeping, feminists, postmodernists and others have drawn attention to the ever-present ethical dimension of interpersonal relations; in other words, the issue of how to deal with another human being *as* a human being. Similarly, if we lift our gaze above the sort of issues that occupy most professional codes and legal ethicists to focus on the way that lawyers interrelate with their clients and with others, we can see that every instance of client representation is replete with ethical significance,<sup>157</sup> not least because clients often entrust important and often emotionally

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their client’s interests it falls into the area of meso-ethics as raising issues of role morality. Similarly, the issue of whether lawyers should undermine the integrity of legal proceedings by zealously pursuing their client’s interests can be said to be both an issue of role morality and macro-ethics.

<sup>156</sup> See *supra* Section I(a)(i), p. 4, especially text accompanying note 23.

<sup>157</sup> James E. Moliterno, *An Analysis of Ethics Teaching in Law Schools: Replacing Lost Benefits of the Apprentice System in the Academic Atmosphere* 60 U. CIN. LAW REV. 83, 107-08 (1991); S. J. Burnham, *Teaching Legal Ethics in Contracts*, 41 J. LEGAL EDUC. 105, 105, 108 (1991); Mary Ann Noone & Judith Dickson, *Teaching Towards a New Professionalism: Challenging Law Students to Become Ethical Lawyers*, 4 LEGAL ETHICS 131, 135 (2001).

charged issues to the lawyer, making the relationship a highly personal one, which involves—or should involve—trust, commitment, care, and consideration.<sup>158</sup> Given the relatively high number of cases handled by students in both clinics, it is hardly surprising that virtually every student reported encountering issues of micro or interpersonal issues involving how to deal with clients in a professional, yet empathetic and non-paternalistic manner, and that many also reflected on how to maintain respect for others they dealt with in the course of representing clients.<sup>159</sup>

A problem commonly encountered was how to deal with clients who did not turn up to meetings or who were otherwise difficult in, for instance, being rude, impatient or not taking advice. Students reflected on how they were challenged to be patient and show an understanding of circumstances that might explain their client's behavior.

[W]orking in the clinic has taught me how to be more patient with people who ask for help but do not want to help himself or herself. I have a few clients who are unresponsive or straight up rude; but I keep telling myself that there are societal and health pressures that have made them the way they are and that I must continue to persevere in trying to get them help. Regardless of their attitude it is my job to help them become healthier in any way that I can.<sup>160</sup>

When I first met Mr. E., he was very respectful and kind. However, some of my conversations over the phone have been less pleasant. Though I am sometimes frustrated with him, I always maintain my composure .... I try to be clear, calm, and patient

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<sup>158</sup> See e.g. Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665, 2665 (1993); Francesca Bartlett & Lyn Aitken, *Competence in Caring in Legal Practice*, 16 INT'L J. LEGAL PROF. 241, 249 (2009).

<sup>159</sup> Cf. Schwartz & Sharpe, *supra* note 103, at 241.

<sup>160</sup> Jennifer, Self Reflection Memoranda, Miami (Spring 2014) (on file with the University of Miami Health Rights Clinic).

with him, but also provide some delicately placed firmness when necessary. ... Even though he can be difficult to work and communicate with, he has serious health problems, and I really want to help him get benefits and make his life even a little easier.<sup>161</sup>

Karen twice faced clients who did not turn up to meetings. On both occasions, she noted how in her personal life she would have responded negatively and intolerantly, but the “Law Clinic constantly challenges your natural reaction to situations” and “because we often work with those on the fringes of society, we need to be more aware of considering situations from the perspective of our clients.”<sup>162</sup> On the second occasion, she admonished herself “to be more understanding as there are often many factors which affect our client’s ability to attend meetings or arrive on time. It would be entirely unprofessional to allow this to have an effect on how I interact or treat the client, and I would like to think this is not something I would ever do.”<sup>163</sup> At the same time, while reflecting the sort of empathetic understanding Law Clinic staff encourage, Karen stated that this “raises the question of at what point we stop being understanding and let the client go.”<sup>164</sup>

Hannah also had mixed emotions about a client interview being cancelled:

I understand that these things are very unpredictable and that is similar of what to expect in a law firm, however I was concerned that the Law Clinic may not be taken seriously by clients as the LC offers a

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<sup>161</sup> See Anne, Self Reflection Memoranda, Miami (Fall 2013) (on file with the University of Miami Health Rights Clinic); see also Tim, Self Reflection Memoranda, Miami (Fall 2013) (on file with the University of Miami Health Rights Clinic).

<sup>162</sup> Diary Entry, Strathclyde (Spring 2013, Weeks 3-4) (on file with the University of Strathclyde Law Clinic).

<sup>163</sup> Diary Entry, Strathclyde (Spring 2014, Week 10) (on file with the University of Strathclyde Law Clinic).

<sup>164</sup> *Id.*



free service and is run majorly by students, hence we may not have the same appeal or command the same respect as a firm would.<sup>165</sup>

The same concern about a possible lack of respect from non-fee paying clients was expressed by Hannah in relation to a client who did not respond to attempts to contact her and by Andrew, who felt that “while me and my co-advisor are putting in as much effort as possible in relation to dealing with the case however we are not receiving the same amount of effort back.”<sup>166</sup> But whereas Andrew only seemed concerned about the impact on himself, Hannah referred to the “waste of clinic resources including the time of volunteers, like myself.”<sup>167</sup>

Chris even admitted that his client’s attitude had negatively affected the level of service he provided:

Unlike the majority of my clients, I never had a fond relationship with [I]. In our first conversation he was discourteous and impatient. From then on, our relationship mainly consisted of him calling me and yelling on the phone for 20-30 minutes. It made me hesitant to contact him in the same way that I did with my other clients. I didn’t see the need to give him a courtesy update on his case when it would result in receiving a painful array of barbs. ... Now, as we are closing his case, his vitriol has increased tenfold and the simplest act of just double-checking his address before sending him a file is met with hours of agony. Nevertheless, I think dealing with

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<sup>165</sup> Diary Entry, Strathclyde (Spring 2013, Weeks 7-8) (on file with the University of Strathclyde Law Clinic).

<sup>166</sup> Hannah, Diary Entry, Strathclyde (Fall 2013, Week 3) (on file with the University of Strathclyde Law Clinic); Andrew, Diary Entry, Strathclyde (Spring 2013, Weeks 9-10) (on file with the University of Strathclyde Law Clinic).

<sup>167</sup> Diary Entry Strathclyde (Fall 2013, Week 3) (on file with the University of Strathclyde Law Clinic).

such a troublesome client has at least given me the experience of dealing with a challenging client.<sup>168</sup>

However, such attitudes were rare, and in some cases, students were encouraged to show greater understanding. For instance, when Hakeem reported that he had not gone “the extra mile” for an impatient and quarrelsome client, it was suggested in the response to his diary entry that he see himself as something like Luban’s “lawyer for the damned”<sup>169</sup> in order to encourage him to display his usual zeal.<sup>170</sup>

Far more common were attitudes of respect for clients and empathy for their plight, though references were far more prevalent in the MHRC self-evaluations than the Strathclyde diaries.<sup>171</sup> This is no doubt at least partly due to the fact that one of the specific learning goals was to “[t]reat clients, lawyers, judges and staff with respect,” and that the importance of understanding and respecting the client’s often very different circumstances, and of developing a trusting relationship with the client was repeatedly emphasized in class discussion and supervision meetings. Thus, many mentioned in passing how they displayed empathy toward their clients,<sup>172</sup> or

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<sup>168</sup> Self Reflection Memoranda, Miami (Spring 2014) (on file with the University of Miami Health Rights Clinic). *See also* Sean, Diary Entry Strathclyde (Spring 2014, Week 2) (on file with the University of Strathclyde Law Clinic).

<sup>169</sup> Luban, *supra* note 25, at 160-66.

<sup>170</sup> Diary Entry, Strathclyde (Spring 2014, Week 5) (on file with the University of Strathclyde Law Clinic).

<sup>171</sup> *E.g.*, In working with a homeless young woman who is HIV+, Anne observed that “C. has had a very difficult life and I was very empathetic to her story and expressed my desire to do my best to help.” Anne, Diary Entry, Miami (Fall 2013) (on file with the University of Miami Health Rights Clinic).

<sup>172</sup> *See infra*, *e.g.*, text accompanying notes 175-78 and 183-89. *See also* Anne, Self Reflection Memoranda, Miami (Spring 2014) (on file with the University of Miami Health Rights Clinic); Sarah, Self Reflection Memoranda, Miami (Fall 2013) (on file with the University of Miami Health Rights Clinic); Jane, Self Reflection Memoranda, Miami (Fall 2013) (on file with the University of Miami Health Rights Clinic).

described actions that revealed their caring and sensitivity.<sup>173</sup> In addition, in the first semester students were specifically asked to discuss a situation where they “interacted with a client, lawyer, government worker, judge, or staff member” and whether they thought they treated such persons with respect. In response to this prompt Roda described how she felt and expressed concern and empathy for a client’s frustrations over scheduling conflicts between appointments to advance the legal case and her employment:

When I explain to her that these time slots are out of my control, she calms down and accepts it. I think she appreciates that I do not demand her to take off work and calmly explain the situation to her.<sup>174</sup>

Similarly, Tim noted, “[n]o matter what, I have tried to build a rapport with each person and find some common ground/interest with them to make them feel comfortable.”<sup>175</sup> Possibly because of being asked specific questions about client interviewing and other aspects of the lawyer-clients relations, as well as the emphasis placed in class and in supervision meetings on the interpersonal aspects of the attorney-client relationship, Miami students frequently linked the need for empathy to developing the necessary rapport for a trusting and collaborative attorney-client relationship.

I met with G. ... to better prepare for his hearing and to build rapport.... [T]he meeting ... enabled G. to get to know me and trust me better, and gave him a chance to tell me his story. ... At the end of the meeting, G. seemed very comfortable with me. ... I

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<sup>173</sup> *E.g., infra*, Maria, note 177; Lynn, Self Reflection Memoranda, Miami (Fall 2013) (on file with the University of Miami Health Rights Clinic) (discussing sensitivity to a client’s mental health needs).

<sup>174</sup> Self Reflection Memoranda, Miami (Fall 2013) (on file with the University of Miami Health Rights Clinic).

<sup>175</sup> *Id.*

was empathetic to his situation and showed him that I understood his inability to work.<sup>176</sup>

... I have also found that my clients ... are looking for an individual that they can trust that will express real concern for them as individuals. Checking up with clients to see how they are feeling or if they need something goes a long way. Asking them about their life and interests, not only about the specific events that led up to their case, generate [sic] the rapport crucial to creating a long-lasting and trusting relationship with the client. ... Additionally, showing empathy to my clients definitely helped with the interaction both in person and over the telephone.<sup>177</sup>

My goal was to not only to develop a case theory, but also to get to know the needs of my client as much as possible. I knew that he suffered from anxiety so I tried to make our time at the Social Security office as stress free as possible. I asked him question[s], but mostly listened to his story and got to know him better. I have built a very good relationship with this client and he trusts me.<sup>178</sup>

Sarah extrapolated the use empathy and sensitivity to a general methodology for communicating with her clients:

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<sup>176</sup> Sarah, Self Reflection Memoranda Miami (Fall 2013) (on file with the University of Miami Health Rights Clinic).

<sup>177</sup> Jennifer, Self Reflection Memoranda Miami (Fall 2013) (on file with the University of Miami Health Rights Clinic). *See also* Jane, Self Reflection Memoranda Miami (Fall 2013) (on file with the University of Miami Health Rights Clinic).

<sup>178</sup> Maria, Self Reflection Memoranda Miami (Fall 2013) (on file with the University of Miami Health Rights Clinic).

Whenever I call clients, I first ask them if there is anything in particular I can help them with so that I understand their most immediate concerns. I ask them to tell their stories so that I can understand their challenges from their perspectives. Additionally, I am sensitive to language differences, and want to make sure that clients understand I am there for them, even if I cannot speak with them directly.<sup>179</sup>

The only Strathclyde student to acknowledge the value of empathy to an effective client relationship also saw this as having an independent intrinsic value. Thus, the positive response of a client to being told that the students would work hard to deal with her case as quickly as possible made Shruti realize that “clients really want to feel that someone actually cares about their issue and want to help them.” She then referred to her desire to improve on the issues she has learned during the Ethics and Justice class: “I have learned that one of the most important ways to help and work with clients is to make them feel that they have someone who is attentive and eager to help them.”<sup>180</sup> To some extent, this echoes Jane’s recognition, which is amply supported by empirical research<sup>181</sup> that to many clients the process of being listened to and cared for is just as important as the outcome. Thus, citing the gratitude of one client and the more resilient attitudes of another, she comments: “I have learned that it is not about me ‘winning.’ The clinic has taught me that some clients just need to feel like someone is advocating on their behalf.”<sup>182</sup> Her views are echoed by Catriona:

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<sup>179</sup> Sarah, Self Reflection Memoranda Miami (Fall 2013) (on file with the University of Miami Health Rights Clinic).

<sup>180</sup> Diary Entry, Strathclyde (Fall 2013, Week 4) (on file with the University of Strathclyde Law Clinic).

<sup>181</sup> Discussed in Clark D. Cunningham, *What Do Clients Want from Their Lawyers?*, 2013 J. DISP. RESOL. 143, 146-51 (2013). See also Hilary Sommerlad & David Wall, *Legally Aided Clients and Their Solicitors: Qualitative Perspectives on Quality and Legal Aid*, The Law Society, Research Study No. 34, at 2-6 (1999).

<sup>182</sup> Jane, Diary Entry, Miami (Spring 2014) (on file with the University of Miami Health Rights Clinic).

I have come to realize that often the mere idea of fairness can be very comforting to many people. Knowing that they weren't "railroaded" by the system and the knowledge that they at least had a genuine chance in fighting their case gives a sense of justice, even if the end result is less than had been hoped for.<sup>183</sup>

Whereas most students simply discussed how they exercised empathy and its value in enhancing client service without referring to how they came to these views, others also echo Jane's implicit recognition of the clinic effect by attributing their growing appreciation of the need for empathy to their clinic experiences.

Through case work I am now more prepared to deal with lawyer-client relations, empathy, listening to the client, maintaining communication to build rapport and also ensure that the client feels confident in my ability and the way their case will be handled.<sup>184</sup>

... I have found it easier to empathize with clients by intimately learning about the challenges they face, and therefore I have learned how to be more tactful when approaching difficult topics.... This experience has evolved what I previously viewed to be a homogenized group of indigent people into individual people who are relatable and deserving of help. I have found myself developing close relationships with clients and enjoy learning about their lives and helping them find success.<sup>185</sup>

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<sup>183</sup> Introduction, Strathclyde (Spring 2014) (on file with the University of Strathclyde Law Clinic).

<sup>184</sup> Hannah, Introduction, Strathclyde (Spring 2013) (on file with the University of Strathclyde Law Clinic).

<sup>185</sup> Kerry, Self Reflection Memoranda, Miami (Spring 2014) (on file with the University of Miami Health Rights Clinic). *See also* Cecelia, Self Reflection Memoranda Miami (2014) (on file with the University of Miami Health Rights

One aspect of legal practice that requires particular sensitivity, empathy, and patience is dealing with clients with mental health problems. Given that mental illness is far more prevalent among those living in poverty,<sup>186</sup> and that there is a correlation between mental health and the stress of, for example, having HIV or being homeless,<sup>187</sup> it is not surprising that MHRC students appeared to learn more about to treat such clients appropriately, as is illustrated by the following reflections:

E. continues to be my most challenging client relationship as he goes back and forth between being completely withdrawn and avoiding me, to being responsive and charismatic. As a function of his bipolar [condition] he is rarely at a stable point so it is often hard to keep him involved in his case and get him to go to appointments and provide needed information. I think my clinical experience has taught me how to approach problems from a number of directions in hopes of finding a solution that works.<sup>188</sup>

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Clinic) (“[E]xperience has taught me valuable skills such as how to approach sensitive subjects with tact and how to cater to different cultural backgrounds.”).

<sup>186</sup> Carla J. Groh, *Poverty, Mental Health, and Women: Implications for Psychiatric Nurses in Primary Care Settings*, 13 J. AM. PSYCH. NURSES ASSOC. 267 (2007); Christopher G. Hudson, *Socioeconomic Status and Mental Illness: Tests of the Social Causation and Selection Hypotheses*, 75 AM. J. ORTHOPSYCHIATRY 3 (2005); Jane D. McLeod & Michael J. Shanahan, *Trajectories of Poverty and Children’s Mental Health*, 37 J. HEALTH & SOC. BEHAVIOR 207 (1996).

<sup>187</sup> Hudson, *ibid*; see also Ezra Susser, Eliecer Valencia & Sarah Conover, *Prevalence of HIV Infection among Psychiatric Patients in New York City Men’s Shelter*, 83 AM. J. PUBLIC HEALTH 568 (1993). For an example of how this correlation is internalized by MHRC students, see, e.g., Jennifer, Self Reflection Memoranda, Miami (Spring 2014) (on file with the University of Miami Health Rights Clinic) (“I interviewed a homeless veteran.... It ... became clear rather quickly that this man suffered from extreme mental illness and his homelessness was a consequence of his failing mental health.”).

<sup>188</sup> Anne, Self Reflection Memoranda, Miami (Spring 2014) (on file with the University of Miami Health Rights Clinic).

Through my interaction with Ms. B, I noticed that she displayed a strong façade, but is in dire need of help. I noticed that she needs the medical care for her HIV, but also requires some sort of mental counseling as she is unwilling and reluctant to share her diagnosis with her family and friends. In order to maintain a relationship with Ms. B., I continue to call her and ensure [sic] her that we are working the best we can in order to get her the care she needs.<sup>189</sup>

Daniela described an initial interview with a prospective client in which her sensitivity to the client's mental status enabled her to recognize, and possibly prioritize, additional legal needs:

Mrs. G. suffers from extreme depression and anxiety, and she has overwhelming guilt over her inability to assist her ill husband in supporting the family. She identified naturalization as her biggest goal. However, it seems that getting her financial assistance through SSI would ease some of the tension in her household and reduce some of her guilt, both of which are factors aggravating her psychiatric conditions. Mrs. G. cried throughout the entire interview, so it was especially important to be empathetic to her situation. Explaining how the clinic works and what we might be able to do to help her did help her stop crying.<sup>190</sup>

A number of Strathclyde students also reflected on the issue of dealing with clients with mental health problems and in fact

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<sup>189</sup> Lynn, Self Reflection Memoranda, Miami (Fall 2013) (on file with the University of Miami Health Rights Clinic). *See also* Maria, *supra* note 177.

<sup>190</sup> Daniela, Self Reflection Memoranda, Miami (Fall 2013) (on file with the University of Miami Health Rights Clinic).



specifically requested a seminar to be devoted to this issue, from which many reported learning practical lessons.<sup>191</sup>

Given that the client may be suffering from depression is also on my mind when dealing with the case, as I would not want to pester the client too much for a reply and end up stressing him out too much or putting too much pressure so that he is sort of turned off from our service. Lawyers will regularly deal with aggrieved individuals and I would imagine there is some sort of balance of counseling being provided and also legal expertise being given due to the client reliance on the lawyer to sort out their problems.<sup>192</sup>

Shruti mentioned in passing that issues of paternalism were exacerbated by her client's mental illness, but was prompted by comments on her diary entry to reflect on whether she had a moral duty to ensure that the client received help for his illness and concluded that "[w]hilst I am not sure if this is our legal duty I can not help but feel a moral obligation to ensure he gets the protection he needs."<sup>193</sup> A more noticeable difference between the two cohorts of students in relation to issues of empathy related to its impact on other aspects of the lawyer-client relationship. In positive terms, Shruti responded to a comment on her diary entry querying whether her reference to being a zealous advocate was the same as neutral partisanship:

I empathize with the client too much to really be "neutral" in that sense. Caring and empathizing with

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<sup>191</sup> *E.g.* Shruti, Diary Entry, Strathclyde (Fall 2013, Week 12) (on file with the University of Strathclyde Law Clinic) ("[O]ne of the easiest (and politest) ways to establish if a client is mentally challenged or lacks capacity is to ask a series of leading questions.")

<sup>192</sup> Andrew, Diary Entry, Strathclyde (Spring 2013, Weeks 9-10) (on file with the University of Strathclyde Law Clinic).

<sup>193</sup> Diary Entries, Strathclyde (Fall 2013, 2014, Week 6) (on file with the University of Strathclyde Law Clinic).

the client really helps to motivate me when working on her case.... Obviously, I have wondered what I would do if I found myself working with a client who I did not empathize with. In a situation like this I believe I would still be able to fulfill the partisan aspect of the role but would need to make a conscious effort to keep myself focused and motivated.<sup>194</sup>

Far more common amongst Strathclyde, but not Miami,<sup>195</sup> students was reflection on the impact empathizing, or perhaps more accurately, over-empathizing may have on other aspects of the lawyer-client relationship. One is that this may lead to lawyers losing the necessary “professional” detachment required to give clients the best possible service—an issue which many students discussed, Jill and John on two separate occasions. Jill first worried that while “as laudable as it is to have empathy with your client’s situation, it is crucial to keep some distance in order to maintain a professional relationship and remain focused on the issues at hand,” but two weeks later she was rather more certain that “perhaps a little more analysis and a less empathy would have served me well.”<sup>196</sup> By contrast, John commented in relation to a client whose plight aroused his sympathy, that “although I know it is important to remain detached, ultimately it is empathy that is needed” and that while “[e]mpathy and detachment are difficult to reconcile, ... an answer for how they can ... will only come with greater experience than I have amassed to date.”<sup>197</sup> Such experience arrived a fortnight

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<sup>194</sup> Diary Entry, Strathclyde (Fall 2013, Week 4) (on file with the University of Strathclyde Law Clinic).

<sup>195</sup> Though Lynn commented that she was starting to understand the fine line between acting as a professional advocate for the clients and also being the person they talk to when they have nowhere else to go. *See* Lynn, Self Reflection Memoranda, Miami (Spring 2014).

<sup>196</sup> Jill, Diary Entries, Strathclyde (Spring 2013, Entries 4 & 6) (on file with the University of Strathclyde Law Clinic).

<sup>197</sup> John, Diary Entries, Strathclyde (Spring 2013, Weeks 1-2) (on file with the University of Strathclyde Law Clinic).

later, when he encountered another client who became upset, leading him to comment that “again sympathy was trying to come through despite it being empathy that was required.” Then, prompted by written comments on his diary entry, he researched the difference between sympathy and empathy and concluded that “empathy is more needed in what we do, as, in my opinion, you can’t remain detached enough to help someone if you feel sorry for them.”<sup>198</sup>

By contrast, while Hakeem was motivated to do some research on the two concepts, he found it of little use in deciding whether he was feeling empathy or sympathy for a client whose situation he felt sorry for and who he “deeply” wanted to help. However, he astutely commented that: “[a]lthough at first it appears that empathy is a desirable quality to have I think with this comes the risk of being overly paternalistic and assuming that the way the client should be dealt with mirrors the way I myself would like to be treated if roles were reversed.”<sup>199</sup>

Here, Hakeem perceptively refers to the second problem posed by empathy in client relations—namely its potential to prompt paternalism. The general issue of lawyer paternalism was a common theme amongst Strathclyde students, two thirds of whom raised it in relation to their cases. But while Hakeem’s comments followed frequent surgery discussions and an in-depth seminar involving reading specifically addressing the issue, some students raised it after only a brief introduction to the issue in induction training.

Thus, within weeks of starting to take on cases, Jill asserted that while “our clients rely on us and we may offer the only opportunity of legal representation to them ... we cannot and should not make decisions for clients about how far to take a dispute.”<sup>200</sup> And in the Introduction to all her diary entries, she confirmed that “at the beginning of my Law Clinic experience I was concerned about

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<sup>198</sup> John, Diary Entries, Strathclyde (Spring 2013, Weeks 3-4) (on file with the University of Strathclyde Law Clinic). See *infra* note 234.

<sup>199</sup> Hakeem, Journal Entry, Strathclyde (Spring 2014, Week 2) (on file with the University of Strathclyde Law Clinic).

<sup>200</sup> Jill, Journal Entry, Strathclyde (Spring 2013, Week 2) (on file with the University of Strathclyde Law Clinic).

client interactions and making sure that I was representing the client's best interests, and not acting in a paternalistic manner."

The fact that this reflection—and that of John on balancing empathy and attachment—occurred before their in-depth discussion in the Ethics and Justice class shows the value of a brief introduction to the topic during training in engendering at least sensitivity to the issue. This can then be built upon to develop ethical judgment by more in-depth exploration and application of the various relevant theories relating to the issue in class. However, most students only raised this issue following a two-hour seminar or tutor comments on diary entries. The need for more than a brief introduction to legal ethics was explicitly recognized by Shruti, who remembered the discussion of paternalism in induction training, but felt that it was overshadowed by other aspects of training. By contrast, she stated that

... after studying paternalism this week I am left wondering why I never felt there might have been a concern with just how much autonomy the client exercised.... My reading this week has made me question if I should have worked more to assure my client was autonomous, or if by trying to dissuade my client from relying on her husband more heavily would be impinging on her autonomy in a way—as how much of it is my business who she relies upon to make decisions and take advice from? Understanding client autonomy and how I can work to support it is something which I feel I need to be vigilant about in any future case I take in the law clinic. ... I am going to try and read up on issues about paternalism and how it works in a lawyer/client relationship.<sup>201</sup>

The value of learning ethics in the context of repeated immersion in casework, and equally of exposing those involved with casework to

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<sup>201</sup> Shruti, Journal Entry, Strathclyde (Fall 2013, Week 2) (on file with the University of Strathclyde Law Clinic).

ethical theory, emerges clearly from Shruti's comments the next week when she started a new case:

I am quite excited about taking on a new case as it allows me to start working on the skills that my time in ethics and justice classes have shown I need to work on, namely getting a better grasp of the correct balance of lawyer client autonomy. Before the initial interview I spent the night before reading over my seminar notes and looking at some of the extra reading....<sup>202</sup>

In fact, the issue of paternalism did arise in the interview, along with questions about the contractual nature of the lawyer-client relationship.

There is obviously a much bigger concern in this case that our client could have been "swindled" somehow out of his house and lost control of his finances. Whilst ... this ... is not the reason the client contacted the clinic and so is no concern of ours I feel that it would fly in the face of the hard work the law clinic has done to improve justice to those most vulnerable if we were to just close the case. Obviously this brings us into a tricky area where my co-advisor and I are investigating this matter where we have not been instructed to but I feel it is our ethical duty to try and ensure that an elderly, frail person has not been taken advantage of. I am going to research into whether or not doing this could still be regarded as "acting within the best interests of our client" and work hard to try and protect our client in case he has been somehow cheated into giving up his home and access to his own finances.<sup>203</sup>

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<sup>202</sup> *Id.* at Week 4.

<sup>203</sup> *Id.* at Week 6.

We see evidence of the USLC's service in Shruti's grappling with this dilemma. But we also see in her later references to client privilege and the concept of informed consent, quoted below, clear evidence of the benefit of drawing on the legal ethics literature to provide more nuanced tools for the exercise of ethical judgment than those provided by the codes and mere common sense—though, as she realized, these nuanced tools do not necessarily enable the simple resolution of difficult dilemmas. Thus, in relation to the suspected swindler, she agonized that

one part of me wants to phone up the third party and essentially tell them to butt out of it—I know that this would be a ridiculous and immature response that would not solve anything so I would never do it. ... Another part of me wants to phone the client and ask them why they are sharing this [privileged] information with the 3rd party when we have outlined that it is not in their best interest to do so. I suppose this ties into issues of paternalism, if you phoned up the client to ask this I would be afraid of acting like a nagging parent telling their child off, essentially patronising the client and their autonomy. It is a very difficult issue to reconcile in my head but I feel that we must regard it on the face of it as the client making an informed choice and respect that—however in this case there are concerns with the mental capacity of our client and the possible risk of 3rd party exploitation that make this line of thinking uneasy for me. Unfortunately if I began talking about these issues I could possibly write a small novella on them! So I am hoping that the next few weeks of seminars and surgeries may somehow help me work out my concerns.<sup>204</sup>

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<sup>204</sup> *Id.* at Week 8.

However, some help was more readily at hand via her tutor's suggestion in the response to her entry that she revisit relevant seminar reading, particularly on the concept of soft paternalism.<sup>205</sup> Shruti responded by saying that the reading "certainly did help" and that:

At the moment I do see a strong argument for using soft paternalism as it seems that our client cannot really make decisions fully autonomously—either due to his disability or due to possibly being exploited by a third party. However until we know the severity and nature of his disability I feel reluctant to pursue soft paternalism—it may be the client is mentally aware and happy with his situation, but suffers from communication problems, or the client could be very mentally ill and not have any legal capacity. I do not want to undermine the client's autonomy because I have misunderstood the situation.<sup>206</sup>

These extended extracts from Shruti's diaries clearly show both the important symbiosis between practice, reflection and theory and the value of repeated exposure to casework experience in allowing students to finesse their existing theory of how to act, develop moral wisdom and make habitual their moral responses to ethical issues. The value of linking theory with practice is also illustrated by Hannah, who used her seminar reading to reflect on a client who was given contradictory advice by a previous voluntary agency, and now appears to value the advice being given by the Clinic:

as Ellmann describes it the client may not always be aware of what is in their best interest or be inconsiderate to moral factors hence the lawyer may express their opinion on the direction the client should take .... This emphasizes Ellmann's argument of the risk and ease by which one can possibly breach client

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<sup>205</sup> Cf. Nicolson & Webb, *supra* note 25, at 126-27.

<sup>206</sup> Shruti, *supra* note 205, at Week 8.

autonomy thus careful consideration is needed to ensure the client is not manipulated by the solicitor.<sup>207</sup>

While this perhaps only shows a consolidation of abstract lessons learnt through reflection on an actual experience, Karen used her case experience in a more transformative way to question orthodox approaches to client autonomy flowing from agency laws which stipulate that it is for clients to determine the ends of representation but lawyers to decide on the means.<sup>208</sup>

To me this always seems like a bit of a grey distinction. In this case it could be argued that the “end” that the client has instructed is “I want you to settle this case for £x.” Therefore it is our responsibility to decide the “means” by which this end is achieved; this means that it can conceivably be argued that the wording of the COT3 [formal settlement document] and the final decision to sign is all for the representative to do without further instructions from the client. However at the end of the day to actually accept the wording of a COT3 and sign without final authorization from the client would be an insane course of action. Any potential risk ... are risks for the client and so it makes sense that the final decision of whether or not to take them is for the client to make.<sup>209</sup>

Then, in responding to a comment on this entry, Karen drew on her reading about the importance of having a moral dialogue with, and

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<sup>207</sup> Hannah, Journal Entry, Strathclyde (Fall 2013, Week 7) (on file with the University of Strathclyde Law Clinic) (citing Stephen Ellman, *Empathy and Approval*, 43 HASTINGS L.J. 991, 1002 (1992)).

<sup>208</sup> Cf. MODEL RULES OF PROF'L CONDUCT R. 1.2 (AM. BAR ASS'N 1983); Nicolson & Webb, *supra* note 25, at ch. 5 *passim*.

<sup>209</sup> Karen, Journal Entry, Strathclyde (Spring 2014, Week 5) (on file with the University of Strathclyde Law Clinic).



gaining informed consent from clients to state that whether lawyers should always follow client instructions “depends on a variety of matters”:

The first is theoretically if you do not wish to follow the instructions you can always withdraw from acting, however depending on how far proceedings have gone this may not be possible. Otherwise I suppose we are considering a matter of zealousness, should you have to follow instructions you think are “wrong” or indeed “crazy” ...? A moral dialogue is important to try and suggest more appropriate courses of action. There’s always going to be a risk in acting without informed consent but what you can do to protect yourself is keep meticulous records of all conversations where you have attempted to get informed consent and perhaps put the information in letters to clients.... I think it is a matter of putting yourself in the clients [sic] shoes and being aware of what you are actually doing, is it truly a day to day task which can count as “means” or is it more?<sup>210</sup>

In addition to illustrating the use of theoretical knowledge in reflection on experience (specifically about the concepts of moral dialogue and informal consent), the above extract also shows how interventions by teaching staff can prompt deeper reflection. In some cases, like that of Shruti’s revisiting reading on paternalism, this involves simply reminding students of ideas found in their reading. But in Karen’s case she was prompted to engage in more nuanced thinking. This experience was repeated later in the semester, when she began by stating:

This kind of case really demonstrates the difficult decisions that are left at the end of the day for our client to make. This case and [another mentioned

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<sup>210</sup> *Id.*

previously] have really focused the place of a lawyer for me. It is neither to decide what the client should do nor how they should do it but instead to provide them with all of the information available, allow them to come to their own decision and then take the action they request. It must sometimes be a hard to do so however this is the role of a lawyer and I think we must be careful, even if we believe that we have the client's best interests at heart, not to overstep these boundaries.<sup>211</sup>

But when asked whether one really “just” gives client options without influencing them, she reflected the more sophisticated position that “it is probably impossible for us, as human beings, to give opinions without influencing[;] however we should be aiming for our personal feelings to influence as little as possible.”<sup>212</sup>

On the other hand, to the frequent and often sophisticated reflection on paternalism by Strathclyde students, no Miami students reflected in writing on the issue. Indeed, their evaluations seemed to reflect that they had perhaps taken actions on behalf of their clients without exploring the possibility that this might impinge on their autonomy, despite the fact that this issue, along with over-sympathizing with clients, was discussed both in individual supervision meetings and in class in the context of the ABA's Model Rules 1.2 (allocation of authority) and 1.14 (diminished capacity).<sup>213</sup> Thus, Cecelia put “her foot down” to stop a client's “extremely assertive and domineering” wife from making it difficult to develop a relationship with the client,<sup>214</sup> without appearing to ask whether the client was happy with this. While it is true that instructions must

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<sup>211</sup> *Id.* at Weeks 11-12.

<sup>212</sup> *Id.*

<sup>213</sup> Compare with JoNel Newman, *Miami's Medical Legal Partnership: Preparing Lawyers and Physicians for Holistic Practice*, 9 INDIANA HEALTH L. REV. 473, 481 (2012) (describing the sort of clinic discussion where these issues have been explicitly raised in the MHRC).

<sup>214</sup> Cecelia, *supra* note 184.

come from the client and not others, she could have explored whether the client's decision to voluntarily allow another to speak on his behalf, even when he "is perfectly alert and capable of articulating his thoughts,"<sup>215</sup> is in itself an exercise of autonomy. Similarly, in relation to a client with diminished capacity who wanted to continue with an immigration application notwithstanding that this potentially exposed her to losing her liberty, Daniela concluded: "Even if she was aware of and willing to take the risk, I did not feel that it was ethical to proceed with my limited knowledge of immigration law."<sup>216</sup> Finally, Lynn asked that a client's partner wait outside during an interview in order to preserve attorney-client privilege and confidentiality apparently without exploring with the client whether she might value the support and participation of his partner over privilege and confidentiality.<sup>217</sup>

It is thus clear that issues of autonomy and paternalism were just as likely to arise in the MHRC as the USLC. Indeed, Miami students were probably more likely to stray into paternal behavior because their clients are generally less educated, more impoverished and more likely to have diminished capacity than USLC clients, and thus more likely to defer to the views of legal advisors, and to tempt their advisors to consciously or subconsciously override their choices by making choices that seem contrary to their best interests.

The striking difference between the discussion of the two cohorts of students on issues of paternalism and autonomy, as well as the difference in emphasis on empathy, respect and the relative importance of establishing a caring attorney client relationship, may be explained by the difference in emphasis in the teaching in the two clinics. The MHRC students were not exposed to the same level of discussion and debate on the issues of paternalism and autonomy as their Strathclyde counterparts, while Strathclyde students had less exposure to theoretical and practical instruction on the importance of connecting across widely different socio-economic backgrounds and cultures. What this clearly suggests is that teaching ethics in a clini-

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<sup>215</sup> *Id.*

<sup>216</sup> Daniela, Self Reflection Memoranda, Miami (Spring 2014) (on file with the University of Miami Health Rights Clinic).

<sup>217</sup> Lynn, *supra* note 194.

cal setting enhances ethical sensitivity, and that the particular dimensions emphasized by clinic and program design will be reflected in students' ethical development.

### (iii) Meso-Ethics

This is seen also in differences between the two student cohorts in relation to meso-ethics—what we defined as ethical issues arising out of the specific obligations of a lawyers, which are either found in their professional codes or are associated with professional role morality, such as the requirement that lawyers act zealously for clients and protect their confidentiality, irrespective of moral consideration. Such differences do not relate to the extent to which the students encountered meso-ethical issues in their casework: 58% of all Miami<sup>218</sup> and 67% of all Strathclyde reported that they did so, though some students encountered more than one issue. Strathclyde students also revealed that they learned from issues raised by others in seminars, surgeries, or issues which became apparent in training exercises.<sup>219</sup> *Prima facie*, a similar range of issues were raised either explicitly or implicitly. These included

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<sup>218</sup> Surprisingly, when asked the following questions that explicitly referenced ethics: "Please describe an ethical issue that arose during your clinic experience. How were you able to spot the issue? How did you address the issue?" one Miami student claimed never to have encountered an ethical issue. Another five reported one semester free of ethical problems, and for another seven the "ethical" issues raised were either extremely trivial (whether to accept hospitality from clients and how to respond to client attempts to get them to provide hospitality), or were not in fact ethical issues. Of course, one cannot read too much into numbers alone given the low base rates of the self-evaluations and the fact that Strathclyde students were encouraged to focus on ethical issues especially when taking Ethics and Justice. Nevertheless, it does seem unlikely that students with caseloads often as high as ten clients would not confront any ethical issues, especially if we are right (*see infra* notes 156-57 and accompanying text) that the highly personal nature of the lawyer client relationship means that virtually all encounters with client have an ethical dimension. Far more likely, the low rate of response to "ethics" questions by MHRC students is a consequence of the U.S. inclination to see ethical issues as limited to those defined and proscribed by a particular rule.

<sup>219</sup> *See infra* Section III(C)(vi), p. 58.

conflicts of interest, confidentiality, whether clients with immoral ends or character deserved representation, whether the students should pursue immoral action on behalf of their clients, and most frequently how they should respond when they suspected or knew that their clients had engaged in some form of dishonesty. Indeed, seven out of nine of all meso-ethical issues raised by Miami students involved suspected fraud by clients on various government agencies (though in two cases further investigation of facts was said to exonerate the client). Miami students might have encountered other issues, as the self-evaluations only ask for one example, and space constraints meant that some Miami students who discussed one ethical issue in a semester might have had more. But, it is also likely that the nature of the work undertaken and, even more so, the clientele of the two clinics was the main reason for the uniformity of the issues encountered by Miami students. Thus MHRC clients tend to be those desperate for state assistance and gaining immigration status and hence much more likely to be tempted to stray from the truth. By comparison, the fact that the USLC handles all civil cases except those involving child custody and serves those falling into the “middle income gap” as well as more vulnerable members of society seemed to result in a wider range of ethical issues.

Despite these differences, students from both clinics learned similar lessons from representing clients suspected of not telling the truth or not being legally entitled to relief, namely they had to be vigilant in checking the facts of their cases—a “trust but verify” approach.<sup>220</sup>

I have learned that even with clients who seem to be forthcoming, you always need to ask certain questions, even if you think you know the answer. ... I have also learned that as a lawyer, my responsibility in acquiring facts is not only crucial and a funda-

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<sup>220</sup> See Hakeem, Journal Entry, Strathclyde (Fall 2013, Week 1) (on file with the University of Strathclyde Law Clinic) (stating that one must avoid directly asking the client whether she is lying to prevent sever[ing] the trust between us and client resulting in him not wishing to pursue the case with us, rendering him without representation from anybody.”)

mental part of being ethical, but often times a gateway to information that I never would have thought was important until it came to light.<sup>221</sup>

[T]here is the possibility that the client did not feel she could trust us to disclose the full amount of her debt. Another option that clients can at times be in denial, however upon questioning she admitted to know of all debt yet still wished to pursue a reduction on other grounds, which frankly would not succeed. Alternatively and more plausibly the client attempted to manipulate [us] and underestimated our competence. She may represent the “manipulative” client that Ellmann refers to in his article. This is clearly disappointing and has now made me alert to situations where the client may attempt to mislead the legal representative. However, it proves that one should not merely accept that which you are told by your client, you must always carry out extensive research.<sup>222</sup>

These quotations<sup>223</sup>—the first from a Miami student and the second from a Strathclyde student—also illustrate a difference between the discussion of meso-ethical issues by the two cohorts, namely whether or not they drew on reading and class discussion. In the case of the Miami students, the lack of in-depth analysis was possibly a feature of space constraints in discussing each of the set topics. Thus, in response to a client whose medical records did not support his claim for benefits, Cecelia simply wrote that she “addressed this issue by coming up with different approaches/theories as to how we could proceed with his case if we did decide

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<sup>221</sup> Anne, *supra* note 171.

<sup>222</sup> Hannah, *supra* note 165, at Week 12.

<sup>223</sup> See also *Ethical Perspectives on Legal Practice*, 37 STANFORD L. REV. 589, 618-20 (1985) (discussing the concept of the epistemological demurrer as presented by Rhodes and referenced by Hakeem).

to, and then by presenting the facts and case theories at a firm meeting.”<sup>224</sup> Anne reported that she essentially ceased her concern about a client not reporting income when she learned that this was not relevant to the client’s legal case, though she “made sure to include the income issue in his intake memo so that moving forward everyone [would be] aware of the issue and [could] address it if needed.” She also told the client “that he should seriously consider reporting his income to the IRS for tax purposes, as is required by law.”<sup>225</sup> Jennifer also leaves the reader with little idea of her moral thought-processes when she discusses a client’s admission of his intention to pay someone to marry him to gain immigration status: “Although I feel awful knowing this; this is his only option to stay in the country. Thus, I told him I do not want to know about the money and only want to see proof of him and his loving wife in the near future.”<sup>226</sup>

Given what was expected of Strathclyde students and the space allowed for reflection, their student diaries unsurprisingly revealed much deeper reflection and evidence of grappling with ethical dilemmas. Thus, by contrast to many Miami students who seemed relieved at the perceived absence of ethical issues,<sup>227</sup> or who dispensed a quick response to comply with obvious ethical rules,<sup>228</sup> some Strathclyde students reflected on how they would have dealt with ethical issues of their cases had the facts been different.

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<sup>224</sup> Anne, *supra* note 187. See also Jane, Self Reflection Memoranda Miami (Fall 2013) (on file with the University of Miami Health Rights Clinic) (describing relief upon learning that her client’s volunteer work was not inconsistent with her disability claims).

<sup>225</sup> Anne, *supra* note 187.

<sup>226</sup> Jennifer, *supra* note 159.

<sup>227</sup> See, e.g., Daniela, *supra* note 189 (“Thankfully, I have not encountered any ethical issues thus far during my client representation”); Cecelia, Self Reflection Memoranda, Miami (Fall 2013) (on file with the University of Miami Health Rights Clinic) (“Fortunately, I have not had any ethical issues arise during my client representation”).

<sup>228</sup> See e.g. Anne, *supra* note 171 (discussing the discharging of ethical duties by instructing clients to comply with the law).

[P]reviously I would have thought that I had never had an ethical conflict on a case but when you really start to think about ethics you start to notice things that could have become ethical issues. For example, a case I had where our client was going to an Employment Tribunal for unlawful deduction of wages. It later transpired that for the first three months of working with his employers the client was paid cash in hand and also claimed unemployment benefits at the same time. I didn't know this until we were on the verge of settling a claim with the respondents and I wonder how it would have affected the claim that I put in for him. Would I have discounted these three months in his Schedule of Loss, for example, or would I have ignored the benefits he received and hoped he wasn't asked about them at the Tribunal? ... I think I've realized that often situations might arise in cases that you wouldn't recognize as an ethical problem or issue until you've started thinking about ethics in a broader sense.<sup>229</sup>

Similarly, a seminar discussion about a case involving lawyers sending threatening letters to unrepresented opponents caused Karen to experience surprise, exclaiming, "wow I didn't realize that this was an ethical dilemma," when she remembered an abusive letter sent to her client. This led her to think about the issue from a different hypothetical perspective:

... obviously if your client, or someone you know was at the receiving end of such a letter we would be very quick to call how unfair and unethical such writing is. However if you are at the other end and are possibly the one tempted to write such a letter to

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<sup>229</sup> Catriona, Journal Entry, Strathclyde (Fall 2013, Week 1) (on file with the University of Strathclyde Law Clinic).



an unrepresented member of public is it possibly far too easy to do so without thinking.<sup>230</sup>

Of more immediate value for the Strathclyde students were seminars which alerted them to issues in their then-current cases which they might not otherwise have noticed. For instance, in reflecting on the case discussed above<sup>231</sup> in which she was worried that her client was being manipulated by his friend, Shruti is prompted by an “issue which [she] examined in [her] seminar” to condemn a solicitor who had acted for both sides in relation to her client’s property transaction. She even asserted that “[i]t might be necessary to make a complaint to the law society.”<sup>232</sup> However, upon being asked if she would file a complaint, she replied that she would not consider using the threat of a complaint as a form of “extortion” to help her client.

The following extended reflection by Hannah in relation to a nurse charged with abusing patients provides an excellent illustration of the value of exposing students to ethical dilemmas in a safe environment and with the assistance of class reading, class discussion and academic and supervisory faculty.

... I was left with the dilemma of having to provide legal advice and possible representation to a person that was willing to exploit vulnerable members of society and clearly abuse his position of trust. It was wrong for me to do so, yet I must admit that I judged him and the impression my co-advisor and I had of the client was one of disgust. As a human being I did feel it immoral and unethical to take this case on. ... If this was a case that I was appointed [to] in the working world then I would have scarce opportunity to object taking on the case. In honesty, I was disap-

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<sup>230</sup> Shruti, Journal Entry, Strathclyde (Fall 2013, Week 3) (on file with the University of Strathclyde Law Clinic). See *infra* note 296 (exploring ethical issues through hypothesizing).

<sup>231</sup> See *infra* note 202 and accompanying text.

<sup>232</sup> Shruti, *supra* note 200, at Week 6.

pointed by my reaction, as a clinic advisor I am to be impartial, yet I failed in this task. I began pondering over the ethics and justice classes and was reminded of the fact that I should adopt a more neutral partisanship role. The client could be the victim of a false-allegation.... However, at the moment, I am not willing to act as ... a 'hired gun' to a client that I do not feel comfortable around.... [A]t no point during the interview did the client try to refute the claims against him.... He admitted he was previously accused of being in a similar situation with another patient.... In the scenario that he is not a victim of false allegation, then he poses a danger to society.... Although this is only a possibility, the fear that he may commit similar abuse in future, and that I may be partly responsible for him to practice again, is a great burden.... I will not be willing to place my own ethical and moral code aside to act in the client's best interests where the client poses a risk to society.<sup>233</sup>

Hannah then returned to the case the following week:

The file has disturbed me considerably.... I feel reluctant to read of the abuse, his denial and defenses seem weak.... I fear I may not be able to advise him with the enthusiasm I have done so in previous cases. However, it is conflicting with my duties of providing him with legal assistance. It may be that the previous case in which a client abused our sympathy for her in order to lead only her contorted version of events has impacted on my empathy for this client. If this is the case, I am unsure how to deal with it and recently discovered the article of *The Lawyer* as

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<sup>233</sup> Hannah, Journal Entries, Strathclyde (Spring 2014, Weeks 1-2) (on file with the University of Strathclyde Law Clinic).

Friend: The Moral Foundations of the Lawyer-Client Relationship by Fried<sup>234</sup> which discusses client relations and empathy. Following the reading I discovered my reluctance was due to my own opinion of appearing bad in the eyes of our client's possible victim. I hope to deal with it by becoming slightly emotionally detached from the case. This is disheartening as I thought I would have acquired the skills to deal with this type of situation. I feel like I am failing my client by having these doubts, thus I decided to speak to my case supervisor who has greatly placed my mind at ease, she stated it is an horrific case. To have a person with great legal expertise find it equally as traumatic as I did made me realize you cannot become immune to a situation. According to Empathy and Approval by Stephen Ellmann in such a pendulum situation I must somehow manage my personality trait of being empathetic to now becoming empathetic enough in a professional capacity. I hope to now adopt this approach in order to act zealously for my client and maintain his best interests.<sup>235</sup>

Nevertheless, as sophisticated as this reflection was, particularly in its reliance on class reading, like many other Strathclyde students, we see Hannah bouncing between the extremes of either just continuing as an amoral advocate for the distasteful client or regarding their moral objections as precluding representation. Unlike in Nicolson's previous analysis of student diaries,<sup>236</sup> there was little evidence of a more nuanced approach taught in class where arguments for and against neutral partisanship and moral activism were weighed up and applied in the specific context of cases.<sup>237</sup> More-

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<sup>234</sup> Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship*, 85 YALE L.J. 1060 (1976).

<sup>235</sup> Hannah, *supra* note 183, at Weeks 3-4.

<sup>236</sup> *Supra* note 17, at 178.

<sup>237</sup> Cf. Nicolson & Webb, *supra* note 25, chs. 8, 9 and 10.

over, when this contextual approach was used, it was always prompted by comments on diary entries. When it was suggested to Jill that taking into account the justice of her clients might be a better way of justifying her decision to use the threat of reporting a criminal offence as a “strong-arm tactic” against an opponent than simply saying that as lawyers in the making she “has a job to do” so cannot adopt the “moral high ground.”<sup>238</sup>

Nevertheless, it should be relatively obvious that reflections of students like Hannah are likely to be much more informed than those without any introduction to legal ethics, especially if the former had as much as two seminars on neutral partisanship. This is made clear by Andrew’s discussion of a classic issue of role morality before being exposed to ethical tools that would have assisted him in dealing with this “very tough case.”

[B]asically the client wants to slow down the process as much as possible to give him time to get rehoused and to get in a better financial position. The ethical alarm bells were going off in my head, what is ethically correct, to delay the process and block the legal process of division of the estate somehow or not block the process—allow things to proceed—the sale of the house—leading to the client being homeless? ... Lawyers are supposed to follow client’s instructions (within the law) but there is a clear margin surrounding legality where lawyers or even clients can push things through or delay things to suit their own wishes.<sup>239</sup>

Unfortunately not only was the Ethics and Justice class months away, but by not submitting his diaries for comments, Andrew could not be referred to relevant reading that suggests that avoiding

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<sup>238</sup> Hannah, *supra* note 232, at Week 2 (on file with the University of Strathclyde Law Clinic).

<sup>239</sup> Andrew, Journal Entries, Strathclyde (Spring 2013, Weeks 1-2) (on file with the University of Strathclyde Law Clinic).

homelessness is the sort of issue which might justify otherwise ethically dubious behavior.<sup>240</sup> In stark contrast, faced with the “always ... difficult decision” of whether to withdraw from representing a client, Jill echoed ideas encountered in Ethics and Justice when exploring the dilemma posed by the fact that “[w]e have set out our stall to fill the ‘unmet legal need’ service gap,” yet have very limited resources.

By implication, our clients do not have the means to instruct their first choice solicitor, and, in that respect, we are the last lawyer in town for them. One consequence of this is that if and when we withdraw, this generally heralds the end of legal representation for the client. I am acutely aware of this, and the pressure this brings weighs heavily on my shoulders.<sup>241</sup>

Then in response to a suggestion to read Bauman’s *Postmodern Ethics*,<sup>242</sup> Jill comments:

I found his proposition that humans are morally ambivalent quite comforting. I have always struggled with the concept that an ethical code can be set down to codify moral behaviour. I found his writing on “Self” and “Other” interesting, but difficult to follow. The concept of moral responsibility as one of being for the other before one can be with the other is challenging. He goes on to express this as the first reality of self, rather than a product of society. I take that to mean that it in some way comes from within, and is not a phenomenon that can be “managed” through application of a set of rules. Returning to the scenario, I take this to be about empathizing with the

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<sup>240</sup> Cf. Nicolson & Webb, *supra* note 25, ch 8.

<sup>241</sup> Jill, Journal Entry, Strathclyde (Spring 2014, Week 4) (on file with the University of Strathclyde Law Clinic); see also Murray L. Schwarz, *The Zeal of the Civil Advocate*, 3 AM. B. FOUND. RES. J. 543, 563 (1983).

<sup>242</sup> Bauman, *supra* note 36.

client's position, standing in their shoes, before being able to advocate on their behalf.<sup>243</sup>

(iv) Macro-ethics

When we turn from more traditional issues of meso-ethics and the more subtle, but perhaps more important, issues of micro-ethics to the macro-ethical issue of whether lawyers owe obligations to enhance access to justice and to be concerned about law's justice, we see the greatest similarity between the two student cohorts' reflection, both as regards their experiences of injustice and sense of responsibility to enhance law's justice.

But even here there were differences in the focus of comments. Thus, unsurprisingly given the nature of their work, the Miami cohort focused more on difficulties they face with unwieldy bureaucracy, unsympathetic bureaucrats and lack of access to counsel or a remedy—the administration of justice—rather than injustices in the underlying substantive law.<sup>244</sup> Thus, Maria observed that although the social welfare and disability systems were “designed for this population ... they have too many systematic walls.”<sup>245</sup> Lynn noted that:

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<sup>243</sup> Jill, Journal Entry, Strathclyde (Spring 2014, Week 4) (on file with the University of Strathclyde Law Clinic).

<sup>244</sup> By contrast, this issue only received one mention in the USLC diaries and only then in a criminal matter in connection with the Innocence Project. *See* Hannah, Journal Entry (Spring 2014, Weeks 11-12) (on file with the University of Strathclyde Law Clinic) (criticizing the police's failure to take seriously a request to release important evidence as “truly shocking ... our client may be serving time due to a wrongful conviction yet the police and other authorities seem to be hiding the fact that they have failed in their duties as they have lost evidence. A person's liberty was removed, his daily life altered and his family relations broken.” She also turned her fire on the “pathetic” criminal justice system more generally for allowing convictions on “feeble evidence” and disallowing her client's appeals “despite the judge admitting the evidence is not faultless.”

<sup>245</sup> Maria, *supra* note 2.

The agencies that we work with aren't always the easiest to maneuver and I cannot imagine most of my clients successfully meeting their goals. I feel that the populations many of the policies and laws are set out to help are not afforded the proper guidance and we can help so much simply by listening to their issues.<sup>246</sup>

Tim echoed this observation:

In terms of the administrative process, it is amazing to me that the law is written so that a person should reasonably be able to represent themselves *pro se* in the administrative process for disability, but now after dealing with it first hand, my view is that over-all premise is not reasonable.<sup>247</sup>

This difference in focus is likely to be explained at least in part by the differences in access to legal counsel and social welfare services between Scotland, which has far more generous legal aid and public welfare systems, and the U.S.<sup>248</sup> Similarly, for reasons

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<sup>246</sup> See Lynn, *supra* note 194; see also comments from Tim, *infra* note 261; comments from Jennifer, *infra* note 263.

<sup>247</sup> Tim, Self-Reflection Memoranda, Miami (Spring 2014) (on file with the University of Miami Health Rights Clinic).

<sup>248</sup> The various U.S. civil legal assistance programs were never intended to be comprehensive, or to provide access to justice for most Americans in need. Joan Grace Ritchey, *Limits on Justice: The United States' Failure to Recognize a Right to Counsel in Civil Litigation*, 79 WASH. U. L.Q. 317, 317 (2001). The federally-funded program has also undergone significant funding reductions and been subject to restrictions on permitted advocacy from even its admittedly modest beginnings. Alan Houseman, *The Justice Gap: Civil Legal Assistance Today and Tomorrow*, Center for American Progress Report 6 (2011), available at: <https://www.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/justice.pdf>.

*Cf.* Tamara Goriely, *Making the Welfare State Work: Changing Conceptions of Legal Remedies Within the British Welfare State*, in THE TRANSFORMATION OF LEGAL AID: COMPARATIVE AND HISTORICAL STUDIES 89-112 (Don Flemming et al. eds., 1999); Francis Regan, *Why Do Legal Aid Services Vary Between Societies?: Re-examining the Impact of Welfare State and Legal Families*, in THE

relating to the nature of the populations it serves and the “brutal need”<sup>249</sup> their clients face, the MHRC’s students’ focus on the general social problems faced by its clientele (as well as the impact it had on the students), was also unsurprising. For example, in her first semester, Anne made reference to the mental and emotional toll “the heavy content of the class” was taking on her.<sup>250</sup> Jennifer recounted that one of her clients requested that she:

send all important documentation to her cousin’s home, not her own home, and requested that I do not show up at her home to have papers signed even though it would be much more convenient for her because, according to her, it would not [be] good if her landlord knew a “black woman” was going through social security proceedings. I think she fears that her landlord will kick her out knowing that she has limited to no money.<sup>251</sup>

Cecelia, working on behalf of a client with rapidly progressing amyotrophic lateral sclerosis,<sup>252</sup> was outraged when an immigration officer denied her client citizenship because he questioned whether the client was “‘competent to understand and attach meaning to the oath of allegiance.’” This experience made me frustrated with USCIS

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TRANSFORMATION OF LEGAL AID: COMPARATIVE AND HISTORICAL STUDIES 179-204 (Don Fleming et al. eds., 1999). For a comparison between the U.S. and U.K. in public assistance, see Alberto Alesina & Edward L. Glaeser, *FIGHTING POVERTY IN THE US AND EUROPE: A WORLD OF DIFFERENCE* 17-54 (Oxford Univ. Press 2004).

<sup>249</sup> *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970); See also Lynn, *supra* note 194 (noting “I understand that they do not always have the resources they need for the most basic things.”)

<sup>250</sup> Anne, *supra* note 160.

<sup>251</sup> Jennifer, *supra* note 176.

<sup>252</sup> Amyotrophic lateral sclerosis is a rapidly progressive, invariably fatal neurological disease characterized by the gradual degeneration and death of motor neurons.



and its process. Mr. V is someone whose case should have been expedited because of his medical conditions rather than delayed.”<sup>253</sup>

By contrast, Strathclyde students were more exercised than their Miami counterparts by problems with substantive law and associated access to justice problems. For instance, an employment case prompted Hannah to question the “capitalism of the law.”

[T]he deserving employee is treated unfairly by his employer yet is expected to suffer due to making a decision based on coercion. The law is not interested in justice, only notice is required to be given by employers. ... [D]ue to their wealth and social standing employers can afford to employ leading lawyers. ... An employee will not generally have such luxury. Furthermore, the injustice and inequality is manifest in legal aid cuts and the extortionate increase in employment tribunal fees .... The entire employment system is farcical and unreasonable.<sup>254</sup>

Jill was similarly prompted to reflect on law’s capitalist foundations by a comment on one of her diaries asking why she thought companies like the one she was acting against were able to get away with avoiding compensation claims by declaring bankruptcy only to re-launch under a new name:

Whilst I do not object to the market economy in principle, I do worry about the lack of controls and the opportunities that presents to companies like this have to exploit others.... I think that company law is an area which is ripe for reform, and the focus must be on consumer protection, and not as it is at present, on protection of those trying to make a fast buck.<sup>255</sup>

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<sup>253</sup> Cecelia, Self-Reflection Memoranda, Miami (Spring 2014) (on file with the University of Miami Health Rights Clinic).

<sup>254</sup> Hannah, Diary Entry, Strathclyde (Spring 2014, Week 6) (on file with the University of Strathclyde Law Clinic); *see also* Hannah, *supra* note 169.

<sup>255</sup> Jill, *supra* note 199.

Catriona also referred to a “hard economic climate [in which] people seem more willing to walk over others to protect themselves” and excoriated the company which had “ripped off” her client by “taking advantage of his very limited resources and language difficulties” to brush off his complaints, while also stating that she was “glad that the Law Clinic gives me a chance to stick up for people who may otherwise be trampled.”<sup>256</sup>

The time bar is a legal doctrine that causes many problems for ULSC clients; though only Lachlan commented negatively,<sup>257</sup> noting that “in some cases the only reason the claim is submitted late is that the claimant has been seeking legal advice and trying in vain to fully understand the situation they are in with their employer.”<sup>258</sup> This led him to conclude that, “the law does not always adequately protect those that it sets out to do” and “that this has galvanized my enthusiasm for the working in the Law Clinic as I want to represent and fight for these people to the best of my ability to give them the best chance of getting treated fairly by the system.” Weeks later, he expressed very similar sentiments about law’s fairness, and claimed to have “a better appreciation of the actual inner working of the legal system and how they affect different sectors of society.”<sup>259</sup>

There was a similar level of awareness in both cohorts in regards to problems faced by many in gaining legal representation and the essential role played by law clinics in their redress. This gap caused many to empathize with and seek to do their utmost for their clients.

The client came to [the] clinic really as a last chance  
saloon after being through solicitors working pro-

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<sup>256</sup> Catriona, Diary Entry, Strathclyde (Spring 2014, Week 11) (on file with the University Strathclyde Law Clinic).

<sup>257</sup> *But see* John, Diary Entry, Strathclyde (Spring 2013, Weeks 5-6) (on file with the University of Strathclyde Law Clinic) (commenting positively).

<sup>258</sup> Lachlan, Diary Entry, Strathclyde (Fall 2013, Week 6) (on file with the University of Strathclyde Law Clinic).

<sup>259</sup> *Id.* at Week 11.

bono and also the [Citizens Advice Bureau]. When I found out that the client had already been through so much it did hit me personally and I felt sad for the client knowing that she had been through so many different loops trying to seek justice.<sup>260</sup>

If my client did not have representation she would probably never have the opportunity to have her case heard.... If it was not for the clinic they would not have access to the legal system at all. Even I get frustrated at how hard it is to navigate the system. The frustration has made me a better advocate because I know how much this population needs our help.<sup>261</sup>

Moreover, without being prompted, a number of students made clear that it was only by working in their law clinic that they fully appreciated problems of justice and access to justice.

I never realized how tough it was to deal with the [Social Security Administration] and how unbelievable the premise is that clients should be able to represent themselves pro se.... The clinic has had a tremendous impact on my professional identity as a lawyer. I have a much better understanding of the underserved and how people's rights are ignored and how they are denied benefits they should be entitled to.<sup>262</sup>

When I started on the path to a law degree ... I thought I believed in access to justice for all; that judicial justice shouldn't just be the preserve of those with the money to pay for it. Having ... become involved in the work of the Law Clinic, I now know

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<sup>260</sup> Andrew, Diary Entry, Strathclyde (Spring 2014, Weeks 1-2) (on file with the University of Strathclyde Law Clinic).

<sup>261</sup> Maria, *supra* note 2.

<sup>262</sup> Tim, *supra* note 246.

that I believe in access to justice, not just as a theory, but in practice.<sup>263</sup>

I have changed in that I am more critical of the public benefits system and realize how critical our role as advocates is—that in many cases—without an attorney this population is essentially barred from access to care. It has further opened my eyes to how many social issues this populations [sic] face and how unfair our country's public benefit system is. It leaves out some of the most in-need populations.<sup>264</sup>

I knew that there were inadequacies in the legal system, but I did not realize how bad it was until I started working with the population we serve. I am glad to be part of a clinic that represents people who would otherwise not have access to the legal system.<sup>265</sup>

Some students expressly referred to their clinic involvement as enhancing their commitment to help redress unmet legal need. As Karen put it, “the more I have become involved in law clinic the more passionate I have become about it.”<sup>266</sup> Similarly, looking back at his two years of clinic experience, Hakeem declared that, “[t]he most remarkable thing that has struck me is that my drive for access to justice has actually increased in my time in the clinic whereas I thought there was a risk that this spark would disappear once I got

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<sup>263</sup> John, Diary Entry, Strathclyde (Fall 2013, Week 9) (on file with the University of Strathclyde Law Clinic).

<sup>264</sup> Jennifer, *supra* note 159.

<sup>265</sup> Maria, *supra* note 2.

<sup>266</sup> Karen, Diary Entry, Strathclyde (Fall 2013, Week 9) (on file with the University of Strathclyde Law Clinic).

into the swing of things.”<sup>267</sup> For Catriona, however, her experiences led to a change in the way she intended to serve the community:

The Clinic has helped me develop a stronger and clearer sense of injustice. Before I joined the Clinic I had a strong, but quite vague, feeling that there was injustice in the legal system, but now ... I feel that I have a much more focused idea of what the problems are and where the injustice comes from, especially the availability (or lack thereof) of Legal Aid funding, and the way the Tribunal system runs compared to how it was supposedly designed to be.... When I first joined the Clinic, I think I just wanted to help everyone and solve all their problems for them. I now ... understand that we can't always help people, or fix everything for them: sometimes the best we can do is help them to navigate the perils of the legal system, but for some people, this can be just as important as winning a big financial award.... I think the most fundamental thing I have learned over the last two years is that there may not be much we can do change the legal system itself, at least in the short term, but we can do a great deal to lessen the impact of, say, Legal Aid cuts, on individuals and help to ensure that there are alternative paths to justice for people.<sup>268</sup>

Even more significant as regards our hope for an altruistic clinic effect, some students declared that their appreciation of access to justice problems had engendered a desire to continue with enhancing access to justice once they graduate. Thus, John admitted that when he returned to university to study law, “he had little knowledge, or interest, in the field of social justice.” However, he went on to state:

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<sup>267</sup> Hakeem, Introduction, Strathclyde (Spring 2013) (on file with the University of Strathclyde Law Clinic)

<sup>268</sup> Catriona, Introduction, Strathclyde (Spring 2013) (on file with the University of Strathclyde Law Clinic).

The law clinic, and in particular the guidance and direction of its director has changed this for me. Social justice is an important field, and one that all too often is overlooked, and regarded as not being particularly “sexy.” Do I see the legal profession as a means to make lots of money? Not anymore, I see it as a way to help others, and by doing so enrich their lives for the better.<sup>269</sup>

Likewise, Tim stated that his clinic “experience has changed my life.”

There are not many people that I know at my level that have ever had an experience working with the underserved like I now have, much less at a point of time where they can affect a change soon after the experience like I may be able to. It was a humbling experience and I greatly appreciate it as these people are now stakeholders in any policy and operational decisions I make going forward.<sup>270</sup>

Maria was even more explicit about the impact on her career plans:

The clinic has really taught me a lot about myself and made me think about what it is I want to do with my degree. Representing people who would otherwise not have access to an attorney or “the system” has been eye-opening. I would like to continue to work with poor communities and do whatever I can

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<sup>269</sup> John, Diary Entry, Strathclyde (Spring 2014, Entry 5) (on file with the University of Strathclyde Law Clinic).

<sup>270</sup> Tim, *supra* note 246 (Tim anticipates a career in health policy and administration). *See also* John, *supra* note 262 (referencing the MHRC’s “tremendous impact on my professional identity” and suggesting a possible impact on his career).

to remedy some of the inadequacies that currently exist.<sup>271</sup>

Similarly, referring to her clinic experience which showed that “people can give without expecting something in return,” Hannah made a commitment to continue engaging in pro bono work on graduation.<sup>272</sup>

(v) Career choice and professional identity development

Hannah also reported that her experience in the Innocence Project showed her that “the state is gradually removing the rights of the private individual” and that this motivated her to want to “defend the individual against the tyrant state” rather than pursue her original intention to be a criminal prosecutor.”<sup>273</sup> In fact, this very same change of intention was also experienced by Lachlan, another member of the Innocent Project, who noted “how valuable an experience my time to date in the Law Clinic has been ... yet another thing to add to list of things that it has taught me.”<sup>274</sup> On the other hand, this experience did not have the hoped for effect on all students. Thus, his experience on a case made Andrew realize that the “fact that I may sympathize with a client too much and want to seek justice may not lead me to be a good criminal lawyer...,” and hence was contemplating a career in commercial law.<sup>275</sup>

These changes in career intention indicate that clinical experience can—as Tim explicitly states in an extract quoted above<sup>276</sup>—have a profound impact on the development of the student’s identity as a future professional. Career choice is one of the

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<sup>271</sup> Maria, *supra* note 2.

<sup>272</sup> Hannah, Diary Entry, Strathclyde (Fall 2013, Week 6) (on file with the University of Strathclyde Law Clinic).

<sup>273</sup> *Id.* at Weeks 11-12.

<sup>274</sup> Lachlan, Diary Entry, Strathclyde (Spring 2013, Week 9) (on file with the University of Strathclyde Law Clinic).

<sup>275</sup> Andrew, Diary Entry, Strathclyde (Spring 2014, Weeks 3-4) (on file with the University of Strathclyde Law Clinic).

<sup>276</sup> John, *supra* note 262; *see also infra* note 277.

most important ethical decisions a lawyer will make, determining both the type of micro-, meso- and macro-ethical issues they will face and the environmental factors that will make it easier or more difficult to maintain a commitment to high ethical standards and a service ideal, whether that newly-professed intention is to serve full time in the public interest or to do pro bono work.

The Miami self-evaluations and Strathclyde diaries are also replete with evidence of student growth as regards a much wider range of issues relevant to professional identity development and growth. In a sense, all learning, at least if internalized and acted upon, involves growth. Indeed, etymologically, to educate means to lead from one place to another. In this sense, all lessons learnt from cases and other clinical experiences show the potential to encourage student growth, particularly when students report, as many did,<sup>277</sup> that they were now sensitized to previously overlooked ethical issues, that they would no longer act in ways that they had in the past, and that their attitudes to specific issues such as access to justice had changed or that they had developed or enhanced particular attributes such as empathy. One specific attribute that could prove particularly valuable in ensuring that students have the moral courage to resist pressures antithetical to ethical and altruistic behavior once in practice is that of self-confidence. In this regard, all the Miami students identified confidence in their own competence and professional identity as an area of major growth in their second semester.

For the most part, MHRC students linked their growth in professional identity and confidence to their ability to act as effective lawyers, though Cecelia and Tim both tied their confidence to altru-professional goals:

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<sup>277</sup> See Cunningham, *supra* note 180, at 146-51; Fried, *supra* note 233, at 1060; Sommerlad & Wall, *supra* note 180, at 2-6; Jennifer, *supra* note 159; Karen, *supra* note 162; Shruti, *supra* note 179; Jane, *supra* note 181; Catriona, *supra* note 182; Hannah, *supra* note 183; Shruti, *supra* note 200; Anne, *supra* note 171; Catriona, *supra* note 288; Karen, *supra* note 229; Hannah, *infra* note 296 (exploring ethical issues through hypothesizing); *infra* note 279; Lachlan, *infra* note 280.



The clinic has helped bolster my confidence in my professional identity. Having had the opportunity to represent underprivileged clients has showed me that I have the power to use my education and skills to help people who really need it and who would otherwise not have access to legal assistance.<sup>278</sup>

I am much more confident in communicating about the plight of the underserved, and I more confident that I can leverage this experience in shaping public policy later in my career.<sup>279</sup>

Strathclyde students were less likely to refer to confidence in their growing skills,<sup>280</sup> but Jill commented explicitly about how the growth of her “self-confidence to stand firmly by my principles could help her resist other pressures in practice.” Even while the other students’ reflections on their confidence in competence is formally only about ethics to the extent that all lawyers owe an ethical obligation to represent their clients competently, confidence in competence can encourage moral courage. Those who can be made to feel inexperienced in relation to their legal skills by their new work colleagues, especially those in authority over them, may also be able to made to feel out of depth in terms of their moral beliefs and hence less able to resist pressures to compromise these moral beliefs.

By contrast to reflections on the specific attribute of confidence, Lachlan reflected more widely on:

how much I had learned in the last year ... about myself for example my strengths and weaknesses as well as how I perform in certain situations. I now feel that one of my strengths is in conveying sympathy and empathy to clients making them feel com-

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<sup>278</sup> Cecelia, *supra* note 184.

<sup>279</sup> Tim, *supra* note 246.

<sup>280</sup> In all, five did so.

fortable but this also links into what I feel is weakness in that I find it very hard to accept when the law doesn't act to redress someone that has been clearly wronged in some way by another party which means I have struggled when having to make this clear to clients<sup>281</sup>

Such self-awareness of strengths and weakness has obvious value to the formation of a professional identity in allowing one to exploit existing strengths and work on—or at least work around—weaknesses. The development of a whole range of attributes which render moral behavior more likely once in practice is even more valuable. Thus, in his final diary submission John reported:

More than anything else I have learned tolerance, and empathy. I have also learned that along with empathy, detachment is an essential skill, and that whilst sympathy may sometimes be required, if you really feel sorry for someone, you can't focus on the task at hand, and adequately provide assistance. I have relearned the art of dealing with difficult clients, and thickened my skin when clients are, intentionally or not, derogatory and difficult.<sup>282</sup>

Similarly in introducing her diaries, Hannah stated:

The diaries are a reflection of my case, [Initial Advice Clinic], training, case surgery and project experiences over the past two years. I have discussed how the involvement in these various activities have [sic] altered my view on individuals, the role of lawyers in society and the importance of performing

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<sup>281</sup> Lachlan, Diary Entry, Strathclyde (Fall 2013, Week 1) (on file with the University of Strathclyde Law Clinic).

<sup>282</sup> John, Diary Entry Strathclyde (Spring 2014, Week 6) (on file with the University of Strathclyde Law Clinic).

ones duties when qualifying as a solicitor. ... I feel I have learnt many of the moral dilemmas which can arise and the methods which should be adopted to avoid them, such as whether I felt I could act as a zealous advocate for a client knowing that I had reservations of his character and guilt.<sup>283</sup>

(vi). Sources of Learning

In the passage above summarizing her learning, Hannah refers to learning from her cases, and it is clear that this was the central focus of the students' learning experience, as indeed it should be if one accepts the theoretical arguments for teaching ethics and inculcating altruism through live-client clinics. While the vast majority of the reflections quoted from both clinics relate to the students' own cases, Strathclyde students also expressly reflected on the issues raised by the cases of other students which they learnt of in seminars or surgeries.<sup>284</sup> Jane in Miami described working with a classmate on an ethically challenging case. "[The ethical issue in] W's case last semester was tough. I worked with [a fellow student] on this case a little bit and helped her navigate preparing for the hearing. His case was challenging, but focusing on representing him as a client and advocate helped."<sup>285</sup> And although Kerry did not mention a particular case, she summarized that she had found that:

[b]y discussing a client or an intake aloud with other students, or listening to another student describe their legal issue, I am able to gain the experience of working with more clients and issues than are presenting on my personal roster. Moreover, I have learned that many tasks are improved with group input, whether it be solving a legal issue, revising a memo or brief, or managing a difficult ethical issue.<sup>286</sup>

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<sup>283</sup> Hannah, *supra* note 183.

<sup>284</sup> See Shruti, *supra* note 190; Hannah, *supra* note 232.

<sup>285</sup> Jane, *supra* note 181.

<sup>286</sup> Kerry, *supra* note 184.

Similarly, while the vast majority of reflection related to ongoing cases, occasionally—as we have seen<sup>287</sup>—Strathclyde students were prompted by classes to revisit earlier cases and reflect on mistakes they had made due to a lack of awareness or more generally how they might have dealt with things differently after learning about the relevant ethical issue. Similarly, when students were asked to reflect on what they would do differently in light of their experience, a number showed awareness of the need for treating clients more sensitively. For example, Kerry learned through an awkward exchange with one of her first clients that a first encounter might not be the best time to discuss the details of a client's HIV status.<sup>288</sup> While this retrospective learning comes too late for the particular client or others harmed, according to character educationalists,<sup>289</sup> lessons learnt from past mistakes go much deeper than learning in the abstract.

In some cases, as with Jill and John's reflection on the problem of balancing empathy with detachment,<sup>290</sup> learning lessons were strengthened by particular ethical issues arising more than once. Such repeated encounters allowed students to experiment with different approaches in an attempt not to repeat past mistakes. We observed this with Shruti's epiphany in relation to her possible impinging on client autonomy.<sup>291</sup> This followed a class on lawyer paternalism, but in Hannah's case, she drew on her own reflection to act differently:

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<sup>287</sup> See Shruti, *supra* note 200; Catriona, *supra* note 288; Karen, *supra* note 229.

<sup>288</sup> See Kerry, Self-Reflection Memoranda, Miami (Fall 2013) (on file with the University of Miami Health Rights Clinic); Tim, *supra* note 160 ("It would have been nice to meet with him in the clinic's private room instead of having to meet with him in the law library where he was subjected to some stares as we walked through"); see also Sarah, *supra* note 171 ("I would try to be even more transparent ... and explain why I am asking the questions I am asking.")

<sup>289</sup> See Aristotle, *supra* note 87, at 33 & 214; Dreyfus, *supra* note 87, at 237; Kupperman, *supra* note 87, at 67; Peters *supra* note 87, at 37; Carr, *supra* note 88, at 242; Condlin, *supra* note 89, at 323; Luban *supra* note 90, at 636.

<sup>290</sup> See John, *supra* notes 196-197; Hannah, *supra* note 234; Hakeem, *supra* note 198.

<sup>291</sup> See Shruti, *supra* notes 193, 202, 203.

The diaries have aided the learning process, I was able to read and ponder over issues from earlier diaries and avoid similar problems arising in future or dealing with them differently. This was evident as dealing with a manipulative client in one diary assisted in keeping my personal feelings of empathy towards the client in another case separate from the legal problem. Thus, I did not repeat the same mistake of over-empathizing with my second client.<sup>292</sup>

It is difficult to imagine a neater illustration of Kolb's learning cycle<sup>293</sup> than that found in her discussion of a concrete experience ("dealing with a manipulative client"), followed by reflection ("I was able to read and ponder over issues from earlier diaries") and then active experimentation as the new theory (not over-empathizing with clients) is applied to "the client in another case."<sup>294</sup> However, given that both she and Shruti would have approached their first case with a theory in mind to apply to their concrete experience, it can be argued that they actually engaged in two instances of active experimentation or, put differently, two revolutions of the learning cycle. The first came in the application of the initial theory to the first case, followed by reflection and adjustment of theory, which was then applied to the second case in the second instance of active experimentation, leading to further reflection—in Hannah's case that she had got things right but in Shruti's case that she had not.

While reflection on cases—usually in relation to actual issues raised, but sometimes in relation to those suggested by hypothesizing about different facts or by reflecting on the activities of

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<sup>292</sup> Hannah, *supra* note 183.

<sup>293</sup> See Kolb, *supra* note 115.

<sup>294</sup> See also Jane, Self Reflection Memoranda, Miami (Spring 2014) (on file with the University of Miami Health Rights Clinic) (describing her ability to rectify her failure to sufficiently get to the know a client so as to help them make an appropriate decision by practicing "this skill" with her new client, thus indicating how reflection on experience can lead to ethical development, in this case that of empathy).

opposing lawyers<sup>295</sup>—was the main source of reflection and learning, USLC students were also prompted to reflect on ethics and issue of justice by other clinic activities<sup>296</sup> and roles within the clinic. One source of reflection on ethics, at least for one Strathclyde student, was negotiation training. This led Hannah to discover that “there may be elements of deceit involved which is a slight ethical concern since we may have to conceal information from our opponent party in the aim of achieving the best deal for our client. Obviously the other party will be doing the same and we will both have a reservation price at which we will not settle.”<sup>297</sup>

Strathclyde students also encountered a range of learning experiences not open to Miami students due to the fact that the USLC is largely student run.<sup>298</sup> Thus, six out of nine of the Strathclyde cohort had a management role and four of them reflected on relevant experience. For example,<sup>299</sup> Hannah commented that in her role as fundraising officer she had made “the grim discovery that many law firms are only interested in appearing moral and contributing to society to attract clients, yet in reality it seems they are not willing to actively contribute (financially or otherwise) in improving access to justice, despite the cuts in legal aid weighing heavily over society.”<sup>300</sup> She stated that this “certainly gives the impression that large corporate firms are only interested in the financial gain they can achieve” and unfavorably contrasted this attitude with the

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<sup>295</sup> See *supra* notes 229-30, at 310. See also Karen, Journal Entry, Strathclyde (Fall 2013, Week 5) (on file with the University of Strathclyde Law Clinic) (criticizing an opposing lawyer for abuse of process by delaying a hearing).

<sup>296</sup> We have also seen that Hannah’s involvement in the USLC Innocence Project prompted comments about issues of justice.

<sup>297</sup> Hannah, Journal Entries, Strathclyde (Spring 2013, Weeks 5-6) (on file with the University of Strathclyde Law Clinic).

<sup>298</sup> See *supra* Section II (noting that while several Miami students return to the clinic for a second year as fellows, and thus have a quasi-managerial and supervisory role, their self-reflections are not at present captured and are not a subject of this study).

<sup>299</sup> See also *infra* notes 308-09 (noting the comments by Catriona and Hakeem in their roles as training officer and Initial Advice Clinic organizer).

<sup>300</sup> Journal Entry, Strathclyde (Fall 2013, Week 6) (on file with the University of Strathclyde Law Clinic).

“student advisors that volunteer their time and effort at no cost but merely to promote access to justice.” Critical comments about access to justice were also evinced from Catriona when she attended a pro bono award ceremony at the Houses of Parliament and reflected on the irony that this was the very place where recent swingeing legal aid cuts had been passed.<sup>301</sup> She then went on to say:

From a personal perspective, it’s interesting to me to think back and see how much my views and opinions on this subject have grown since I started Uni two years ago. I find myself thinking more and more about how important it is to remember that the need for pro bono work exists because of the lack of state-funded resources in this area, and that pro bono work, in the long term, is more of a stop-gap measure against the increasingly prohibitive rules of the government.<sup>302</sup>

Implicit in Catriona’s words are the recognition of the impact of role models, which as we have seen are regarded as an important source of learning and character development. In both clinics, supervisors and academic staff involved in clinic work and teaching are likely to constitute the most visible role models. We have already seen John’s reference to “the guidance of the [Clinic] director.”<sup>303</sup> Jill also cited Frances, a practicing solicitor who teaches Ethics and Justice, in this regard:

Understanding my ethical approach will help to give clarity to decision making, most importantly to let me understand why I making certain decisions. As a practitioner, Frances added context to this, and through real life experience was able to bring much

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<sup>301</sup> Albeit in England and Wales—Scotland controls its own legal aid budget.

<sup>302</sup> Journal Entry, Strathclyde (Spring 2014, Week 10) (on file with the University of Strathclyde Law Clinic).

<sup>303</sup> See *supra* note 286.

of this to life. This is an affirmation of the value of the clinical approach to learning, and has given me the self-confidence to stand firmly by my principles as my career progresses.<sup>304</sup>

Another source of role models in the USLC are the volunteers who provide training and one-off advice in the Initial Advice Clinics. Both groups were cited as moral exemplars by Catriona and Jill who, respectively, were responsible for these activities.

It is very heartening to see how many people are prepared to give up their time and resources to come in and do training events for students ... judges, advocates, solicitors, and lecturers, among others.... In general there is quite a lot of cynicism about the legal profession, and especially commercial firms, but it has been nice to realize this year that there are a lot of people who are prepared to re-invest their own skills and experience in students, and the Law Clinic, and that not all lawyers are bad!<sup>305</sup>

Since January, I have been ... arranging and facilitating fortnightly sessions where legal advice is given by volunteer practitioners and student Advisors. I have been heartened by the strength of their commitment to the project and to the pro bono cause in general. The practitioners are very busy individuals who are giving of their time at the end of what I'm sure is a long and often stressful day and gives me a degree of comfort about the profession I am planning to enter. I find it concerning that I may end up working in a company where the bottom line is the only

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<sup>304</sup> Jill, Journal Entry, Strathclyde (Fall 2013, Week 9) (on file with the University of Strathclyde Law Clinic).

<sup>305</sup> Catriona, Journal Entry, Strathclyde (Spring 2013, Week 2) (on file with the University of Strathclyde Law Clinic).



concern, and where client autonomy is at a level where the practitioners are hooked on the client's line and there they must stay until the deal is done. This is my nightmare scenario, and one I must avoid at all costs, for the sake of my sanity! So it is a relief for me to see that there may be other options; that people exist in the profession who care enough about some of the things that are wrong in our society, and that these people are offering a professional service in respected legal firms.<sup>306</sup>

Jill returned again to the impact of role models, but this time to those operating within the clinic itself.

We have strong role models in the Law Clinic, and they help to guide us. In this way, I feel that the Law Clinic ethos may influence future generations of solicitors, and, I hope, help to make the lawyering profession more respected in society, rather than lawyers being seen merely as “special purpose friends” preferring the interests of their clients over all else.<sup>307</sup>

In addition to evidencing the added value of theory to experiential learning though referencing Fried's article on the lawyer as friend,<sup>308</sup> Jill also touched upon an important source of learning in clinics, namely the informal socialization into values found in the prevailing norms adopted by existing members and passed down from one generation to another—what the USLC likes to call its “ethos” Catriona and Hakeem also noted the potential positive impact of this ethos and sense of collegiality: the former reflecting

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<sup>306</sup> Jill, Journal Entry, Strathclyde (Spring 2013, Week 3) (on file with the University of Strathclyde Law Clinic).

<sup>307</sup> Catriona, Journal Entry, Strathclyde (Fall 2013, Week 1) (on file with the University of Strathclyde Law Clinic).

<sup>308</sup> Hannah, *supra* note 234.

on the USLC's tenth anniversary; and the latter on his two years in the clinic:

The ten-year event was really good for morale in the Clinic because it highlighted, and reminded us all, of the bigger picture: where the Clinic came from, its ethos, how many people it has helped already, and where it is going in the future. It made me feel proud to be part of the Clinic, and lucky to be part of such a great team of people with the same ideas about access to justice as I have.<sup>309</sup>

Something that has contributed to me enjoying the clinic so much is the people and general ethos and principles that underpin the clinic. There is a real sense of purpose and enthusiasm within the Clinic which is something to be celebrated.<sup>310</sup>

More specifically, Hakeem attributes his increased drive to promote access to justice, which was quoted above<sup>311</sup> to “the attitude of the whole Clinic which keeps advisors motivated to strive towards assisting many people in the best way possible.”<sup>312</sup> On the other hand, the more concentrated nature of the MHRC experience and the student's positive response to its emphasis on teamwork also contain a potential for students influencing each other's moral

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<sup>309</sup> Catriona, Journal Entry, Strathclyde (Spring 2014, Week 4) (on file with the University of Strathclyde Law Clinic).

<sup>310</sup> Hakeem, Journal Entry, Strathclyde (Spring 2013, Week 11) (on file with the University of Strathclyde Law Clinic).

<sup>311</sup> Strathclyde, *supra* note 267.

<sup>312</sup> Hakeem, Introduction, Strathclyde (Spring 2013) (on file with the University of Strathclyde Law Clinic). As argued above, the effect of informal socialization of this ethos is enhanced by the student ownership and leadership of the clinic (*see* note 155), and by student mentoring (*see also* text accompanying notes 104-05). However, unlike in Nicolson's previous analysis (*supra* note 17, at 181), there was no mention in the diaries analyzed here of learning or teaching moral lessons in this way.

views, though reports of learning this way were often confined to the practical advantages of teamwork,<sup>313</sup> and in Maria's case a questioning of the (otherwise) competitive environment of law and law school:

Before the clinic, I seldom saw people working together or helping each other. I think the team effort involved in the clinic is one of the most unique characteristics of it. It has really taught me that lawyering should be a team effort. Ultimately we all have the same end goal, and that is to help our clients.<sup>314</sup>

This sense of common purpose—to improve the plight of the clinic's clients—also featured in Sarah's reflection:

I am truly enjoying my time in the clinic and love representing clients, knowing that the hard work I put in can directly improve their quality of life.... It has been wonderful to work in such a strong team-oriented atmosphere. Other students have helped me tackle challenges and I have been able to help them in return.... On other teams, I have sometimes found it challenging when different people have different visions of an end goal. On this team, however, we are all figuring out the process together, which has been extremely helpful and rewarding.<sup>315</sup>

In this quotation, Sarah evidences another important source of learning from experience,<sup>316</sup> namely the feeling of satisfaction at her

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<sup>313</sup> See Daniela, Self Reflection Memoranda, Miami (Fall 2013 & Spring 2014) (on file with the University of Miami Health Rights Clinic); Chris, Self Reflection Memoranda, Miami (Fall 2013) (on file with the University of Miami Health Rights Clinic).

<sup>314</sup> Maria, Self Reflection Memoranda, Miami (Spring 2014) (on file with the University of Miami Health Rights Clinic).

<sup>315</sup> Sarah, Self Reflection Memoranda, Miami (Fall 2013) (on file with the University of Miami Health Rights Clinic).

<sup>316</sup> See *supra* note 90 and accompanying text.

conduct. Other students also expressed satisfaction largely at helping others, though also at some aspects of interpersonal ethics. Cecelia noted that using her “education and skills to help people who ... would otherwise not have access to legal assistance ... has been a very rewarding experience that has taught me how to deal with people on a professional level.”<sup>317</sup> Maria reported:

My biggest success has been getting my clients to trust me and see me as a professional. Some of them have thanked me, and that makes all the difference in the world to me because it gives meaning to what I am doing. I have not enjoyed anything in law school as much as I am enjoying the work that I am doing in the clinic. ... It is truly satisfying to work with people who have nothing, and are so grateful for all the help we offer them.<sup>318</sup>

In Nicolson’s early study, some students specifically linked the rewarding nature of helping clients to their intention to enhance access to justice after qualification.<sup>319</sup> Here, Cecilia hinted at such a link by preceding the comments quoted above<sup>320</sup> with the acknowledgement that “the clinic has helped bolster my confidence in my professional identity.”<sup>321</sup> Tim’s express reference to his career plans in relation to his positive experience in helping in a passage quoted above<sup>322</sup> strongly suggests that he found this experience rewarding.

The converse of feelings of satisfaction are those of regret at one’s conduct and these equally can have a profound effect on learning. Here, we have already seen Hannah’s expression of disappointment at her inability to put her personal moral views aside when

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<sup>317</sup> Maria, *supra* note 313; *see also* Daniela, *supra* note 312; Hannah, *supra* note 294.

<sup>318</sup> Maria, *supra* note 313.

<sup>319</sup> Nicolson, *supra* note 17, at 181.

<sup>320</sup> Maria, *supra* note 313.

<sup>321</sup> *Id.*

<sup>322</sup> Strathclyde, *supra* note 280.

faced with a client accused of abusing patients.<sup>323</sup> In other cases, regret was expressed at the quality of work done for clients. Thus, having to write with bad news to a client was for Karen “one of the hardest things I’ve done in [the] law clinic from an emotional standpoint. This was partly due to the fact that mistakes were made on this case and I had a strong feeling of having let the client down.”<sup>324</sup> While none of these students made clear how such feelings would impact on their future behavior, it is difficult to believe that concern at past failings would not cause them to act differently in the future.

While the above discussion shows that students can learn from their own feelings or thoughts or the examples provided by others, we have also repeatedly seen how the Strathclyde students drew explicitly or implicitly on their seminar reading and class discussion to help them resolve or at least grapple with issues which arose in their cases. Moreover, some<sup>325</sup> were prompted to independently discover relevant literature, though it is difficult to know to what extent this was always motivated by a thirst for knowledge rather than a desire to ensure higher marks. While in some cases the brief introduction to ethics in the induction training was enough to sensitize students to issues, without exposing them to the relevant academic writing on ethics and justice and helping them to gain a better appreciation of the ethical tools and ideas about justice their response to issues remained superficial and unsophisticated,<sup>326</sup> and sometimes unduly complacent.<sup>327</sup> In other words, just as we noted earlier that experiential learning “occurs not in the doing but in the reflection and conceptualization that takes place during and after the event,”<sup>328</sup> it is equally true that such reflection and conceptualization is considerably enhanced by relevant classes and reading. Indeed, for one student at least, such class discussion and reading was what gave reflection its value and point.

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<sup>323</sup> Fried, *supra* note 233; Hannah, *supra* note 234.

<sup>324</sup> Karen, Journal Entries, Strathclyde (Spring 2013, Weeks 5-6) (on file with the University of Strathclyde Law Clinic).

<sup>325</sup> See e.g. *supra* notes 197-98 and 235 and accompanying text.

<sup>326</sup> See *supra* notes 236-38, and accompanying text.

<sup>327</sup> See *supra* notes 217, 226-27 and accompanying text.

<sup>328</sup> See *supra* note 112 and accompanying text.

I have always had a rather poor opinion of self-reflection and its effects upon learning. However I feel this set of diaries have really helped me to see the benefits of reflection when learning. ... [W]hat I found really helped me was each week having a seminar topic to think about as I wrote my diaries... For me this made the diaries more of a “real” experience because I could almost see an automatic linking between the seminar, reflecting in the diaries and then the learning. This meant reflective learning was no longer easily assigned to its own neat little box which could be completed and then entirely ignored.<sup>329</sup>

However, the students’ reflections were not a solitary exercise, but were considerably enhanced by the different perspectives of others particularly those with greater experience and a deeper theoretical knowledge. In both clinics, such processes occurred in class and in supervision meetings, which in the case of the MRHC were held weekly rather than sporadically as at in the USLC (except for during Ethics and Justice), and were coupled with mid-semester oral evaluations. However, as discussions in these fora were not captured in writing, their impact cannot be gauged. By contrast, as we have repeatedly seen, the provision of written responses to the Strathclyde students played an important role in enhancing their moral sensitivity and judgment. Such academic interventions:

- alerted students to potentially problematic ethical issues which they had overlooked<sup>330</sup> or which if they noticed, had regarded as unproblematic;
- exposed them to new issues through imagining alternative versions of the facts of their cases or by asking whether a

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<sup>329</sup> Karen, Introduction, Strathclyde (Fall 2013) (on file with the University of Strathclyde Law Clinic).

<sup>330</sup> See *supra* note 232 and accompanying text; cf. notes 212-216 and accompanying discussion (showing how such an intervention would have allowed buried ethical issues to surface).

possibly immoral solution which they had not contemplated might ever be justified;

- required students to clarify for themselves the exact nature of their ethical stance on particular issues;<sup>331</sup>
- referred students to relevant reading to enhance their understanding of issues;<sup>332</sup>
- encouraged students to adopt new perspectives in dealing with dilemmas,<sup>333</sup> think more deeply and in a more sophisticated way about issues they had raised<sup>334</sup> or justify ethical positions they had taken.<sup>335</sup>

#### IV. CONCLUSION

There is no doubt that the student's clinical and learning experience had an impact on their awareness of micro- and macro-ethical issues, and, to a lesser extent, meso-ethical issues. Moreover, even taking into account the possibility that the views of some were designed to garner good grades, many seem to be genuinely motivated by their experiences to want to act in an ethical and altruistic way once they graduate. Of course, at this stage there is no way of knowing that they will go on to do so, especially given the many powerful countervailing institutional, financial, family and personal pressures.<sup>336</sup> However, personal contact with other students who have gone through the clinical experience and expressed a desire to act altruistically and ethically indicates that many are doing so. For instance, a student in Nicolson's earlier study who stated that before his clinic experience "I had imagined a career in a large law firm and hadn't really considered the larger ideal of social justice" and

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<sup>331</sup> See *supra* note 193. See also John, *supra* note 268 (responding to being forced to clarify why he entered USLC if he was not interested in social justice).

<sup>332</sup> See *supra* notes 204, 242.

<sup>333</sup> See *supra* note 169.

<sup>334</sup> See *supra* notes 192, 197, 209, 211 & 235.

<sup>335</sup> See *supra* note 237; see also Journal Entry, Strathclyde (Fall 2013, Week 5) (on file with the University of Strathclyde Law Clinic) (discussing comments questioning Karen's categorization of delaying tactics as an abuse of process).

<sup>336</sup> See *supra* notes 75-77.

that [n]ow I find it impossible not to”<sup>337</sup> has followed a career path working for charities. Moreover, the volunteers at USLC’s Initial Advice Clinics largely comprise its alumni. Similarly, two MHRC alumni are currently working as public interest fellows and many have volunteered their time on pro bono matters. Clearly, there is a need to track the careers of alumni of both clinics to determine more systematically whether they have maintained the ethical and altruistic commitments espoused in their self-evaluations and diaries, and whether their ethical and altruistic behavior differs in any way from law graduates who have not been taught ethics in the context of live-client clinic experience. It would also be interesting to see whether the professional behavior of Miami and Strathclyde graduates differ given the difference between their clinical, educational and reflective experiences, as well as their orientation towards justice which they brought with them when commencing their clinic involvement.

As regards differences in design and educational objectives between the two clinics, they do not seem to have a noticeable impact on their ability to foster awareness of social justice issues, and inculcate or sustain a commitment to play a role in enhancing social justice on graduation. Given that Strathclyde students are screened according to their existing commitment to social justice, compared to the Miami students, they might start and end up at higher levels in terms of the strength and durability of such commitment. However, contrary to the prior assumption made by Nicolson,<sup>338</sup> the mere fact that all students participate in the MHRC for academic credit does not by itself mean that its potential to inculcate altruism is undermined. This had become apparent from his grafting of the Clinical LLB onto the predominantly social justice-oriented and extra-curricular USLC. But, given that the clinic remains largely extra-curricular, it can always be said that this is the reason for the continued dominance of the social justice ethos.

However, the Miami students’ self-evaluations seem to show that the issue is, not so much whether particular clinics do or do not

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<sup>337</sup> Nicolson, *supra* note 17, at 181.

<sup>338</sup> Nicolson, *supra* note 11.



provide credit for clinic activities, but whether their prevailing ethos prioritizes serving the community over providing students with skills and knowledge. In fact, even if clinics do teach skills and legal knowledge directly for their own sake, rather than merely to ensure that the community receives effective services, the Miami students show that they will not necessarily see clinic work as merely a means to their educational and vocational needs if they are also taught, their tutors model, and the prevailing clinic ethos upholds the idea that client and community needs must take precedence over those of students. If so, while a social justice orientation may be less prone to being undermined in extra-curricular clinics than in those where the educational needs of students are prioritized, there is no necessary connection between volunteerism and prioritizing community service over educational goals. Moreover, given that it is possible to assess students on the effort and empathy with which they serve their clients rather than their skills or knowledge gained, it would seem that in terms of ethical development the main advantage of extra-curricular over curricular clinics, is that their cost-effectiveness enables them to expose more students over a longer period to the potentially transformative experience of assisting vulnerable members of the community.

On the other hand, when it comes to using clinical experience to teach micro- and meso-ethics, and (to the extent that it benefits from classes on access to justice and the opportunity for reflection) macro-ethics as well, curricular programs have considerable advantages in exposing students to class reading and discussion, and in requiring them to reflect on both theory and experience. Yet, to the extent that clinics try to ensure that students are rendered practice-ready, opportunities for ethical teaching and reflection are reduced. As we saw, the type of cases undertaken also affects learning opportunities, with the more specialist nature of the MHRC, as well as the fact that dialogue with students about their reflections was not confined to learning ethical lessons as at Strathclyde where there is a separate supervision process to address the quality of services, appearing to result in a narrower range of (particularly meso-) ethical issues than those discussed by the Strathclyde students. Similarly, differences in the demographic profile of the

two clinics' clientele affected the extent of the students' exposure to issues of social justice and access to justice, and hence the extent to which they might be conscientized by their experience. Admittedly, these differences owe much to the better provision of legal aid and social welfare benefits in Scotland. Nevertheless, it remains true that those who want to inculcate altru-ethical professionalism through clinical experience need to think carefully about the nature of the case-work undertaken, the profile of the clients served and what, if any, other educational goals are pursued. Also relevant is whether students are given a role in clinic management and mentoring.

We thus see how comparisons between the two clinics and their educational programs provide much "food for thought" for those seeking to enhance the apparent ethical and altruistic effect of clinics. Similar benefit is derived from comparing the different formats of student reflection. Indeed, both authors have re-assessed the role that reflection plays in the ethical learning of their students. As discussed above,<sup>339</sup> the typology of the written student reflection varies widely between the two clinics, and can be organized along a continuum relating to the following modalities:

- Reflection first versus theory first
- Oral versus written
- Summative versus episodic/on-going
- Brief versus extensive
- Directed versus open-ended
- Monologue versus dialogue<sup>340</sup> (sometimes including more than two persons).

We also saw that, prior to this study, Newman had developed a methodology that had MHRC students largely reflecting directly on their experiences in advance of the introduction of formal ethical

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<sup>339</sup> See *supra* Section III(a).

<sup>340</sup> And where there is a dialogue whether it is between the student and a supervisor concerned with ensuring quality services as well as educating students, as is the case at the MHRC, or between student and an academic only concerned with education, as at the USLC.

theory. Written reflection in the MHRC is also relatively brief, summative and directed. Nicolson's methodology involved reflection following initial theoretical discussion and being captured in lengthy and broad-ranging entries, written on a frequent basis (episodic) and in response to very open-ended prompts. Importantly, too, for this discussion, dialogue between professor and clinic student is conducted orally at Miami but in writing at Strathclyde dialogue. Clearly, these differences affected the quality of reflection and learning in ways that are instructive for clinicians who seek to inculcate an altru-ethical professional identity in their students.

Thus, the comparative brevity of the Miami self-evaluations and their coverage of all course learning objectives meant not only that students were discouraged from fully exploring ethical issues in the written reflections undertaken, but also that we learn less about the clinic's impact on their ethical development. By contrast, the requirement of making both regular and lengthy entries meant that Strathclyde students were forced to reveal their thoughts, feelings and values in far more detail and the reader can more easily observe that student growth without interpretation by the supervisors. On the other hand, the fact that the Miami students reflected at set times in the semester and were given specific prompts to which to respond encouraged them to reflect far more in overall changes in their attitudes, values and behavior. Some Strathclyde students did engage in a similar reflection on their overall growth in the introductions to their diaries, but these were not compulsory nor were students specifically encouraged, let alone directed, to reflect on changes in their ethical knowledge and values.

But perhaps the biggest difference between the two types of reports is the opportunity offered to Strathclyde students to submit their diaries for comments in order to deepen and broaden lessons learnt. While it is true that face to face supervision at the MHRC might have had a similar impact, giving students a longer time to reflect on their responses to tutor suggestions might lead to greater thoughtfulness, and requiring students to commit their answers to paper is likely to make the lessons more memorable. On the other hand, face-to-face dialogue allows tutors to probe student thinking in greater depth and correct misconceptions. This suggests to us that

clinical teachers should make an effort to provide frequent opportunities for students to engage in written reflection on ethical issues, and that they should strive to provide at least some written responses that do not replace, but rather help to concretize and capture, important elements of the oral dialogue that is so invaluable in good clinical teaching. We also found that asking students to summarize their development regarding issues of justice and ethics was useful both to us in helping us understand the “clinic effect” as well as to the students in bringing home those lessons.

Analyzing this material was valuable to us, not only in providing further evidence of the alleged clinic effect on ethical development and altruistic commitment, but also in allowing both clinics to learn from each other. Thus, in the light of this analysis, Newman has altered her learning goals and the prompts she gives students on written reflection assignments to specifically ask them to reflect on what they have learned about access to justice and the role of lawyers in an effort to make the clinic’s social justice mission more transparent to students, and has also expanded the ethics reflection prompt to include an unlimited number of examples. Similarly, because this comparative analysis of her students’ reflections revealed that MHRC students (like many American lawyers and law students), were inclined to see “ethics” as rule-based, rather than encompassing issues of role morality, social justice, etc., Newman has revised sections of her clinical seminar—including having Nicolson guest lecture for one class—in an effort to teach against the prevailing U.S. norms that confine law school ethical teaching to the ethical rules. In this respect the clinic seminar also spends more time discussing issues of detachment and empathy, ends/means, and paternalism, as the comparison of USLC and MHRC revealed that USLC students were more sophisticated in identifying and considering these issues.

Having not only reviewed the written reflections of both cohorts, but having also had the opportunity to hear from and observe the managerial work of the USLC students, Newman is considering whether, and how, to incorporate a larger role for Miami students in the organization and operation of the clinic, both as a

means of fostering greater student ownership and commitment and to hopefully ensure that the clinic's ethos and social justice mission and orientation survive beyond any single faculty member's own vision and direction of the clinic. Some of the most obvious limitations in the reflective writings of MHRC students as compared to those of USLC's, however, have seemed the most vexing to remedy. While ideally Newman would like to have her students memorialize their reflections on some of these issues on a weekly basis and to capture in writing some of the student reflection and supervisor feedback at frequent intervals, the daily demands and expectations for the volume of legal work she has placed on both herself and her students has thus far thwarted this goal. The provision of service to (yet more) clients continues to prevail over this worthy academic goal.

Nicolson, on the other hand, has already made compulsory an introduction to each semester's set of diary entries as well as to all diaries written over the course of the Clinical LLB in which students are encouraged to consider the extent to which their clinical and educational experience have changed their attitudes, values, and behavior. Observing the difference between the more open-ended nature of his students' reflection and the more constrained reflection of the MHRC students, he has also decided to give his students even greater autonomy by abandoning specific word limits for entries, responses and introductions and replacing this with an overall word length so that students can tailor their level of reflection to the issue discussed. Finally, he is keen to try and extend his dialogue with the students beyond the current situation where students respond to his comments on their entries in order to responds to their responses with the aim of deepening their reflection and knowledge and understanding of ethics even further. However, like Newman, the other demands on his time, flowing from the fact that he is a full-time academic and director of a large and multi-faceted clinic which like the MHRC emphasizes service to the community over student education, mean that it is the latter goal which is regarded as taking precedence over ethics teaching. Indeed, as we have repeatedly

stressed,<sup>341</sup> to the extent that teaching takes precedence over community service, both clinics are likely to undermine the very ethical message that they are trying to convey, namely that assisting those most in need and placing client needs over those of self are the highest moral duties that a lawyers can uphold. Fortunately, the words of the students analyzed in this article suggest that this message and more generally, the importance of ethics seems to be having an effect.

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<sup>341</sup> See *supra* note 11 and text accompanying notes 118-119.